

The Judge Advocate General's School
Charlottesville, Virginia

LAW OF WAR WORKSHOP DESKBOOK

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*All of the faculty who have served with and before us
and contributed to the literature in the field of the Law of War*

1997

International and Operational Law Department
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MAJOR TREATIES GOVERNING LAND WARFARE

Abbreviated Name

Full Name

GWS/1st GC

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, DA Pam 27-1.

GWS Sea/2d GC	Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, DA Pam 27-1.
GPW/3d GC	Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, DA Pam 27-1.
GC/4th GC	Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, DA Pam 27-1.
GP I/Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 10 June 1977, DA Pam 27-1-1. (Not Ratified by U.S.)
GP II/Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, 10 June 1977, DA Pam 27-1-1. (Not Ratified by U.S.)
H. III	Hague Convention No. III Relative to the Opening of Hostilities, 18 October 1907, DA Pam 27-1.
H. IV	Hague Convention No. IV Respecting the Laws and Customs of War on Land, 18 October 1907, DA Pam 27-1.
HR	Annex to Hague Convention No. IV embodying the Regulations Respecting the Laws and Customs of War on Land, 18 October 1907, DA Pam 27-1.
H. V	Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907, DA Pam 27-1.
1925 Gas Protocol	Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, of Other Gases, and of Bacteriological Methods of Warfare of 17 June 1925, 26 U.S.T. 571.

BWC/Biological Weapons Convention	Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583.
CWC/Chemical Weapons Convention	1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800.
1954 Hague CP Convention	1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216.
ENMOD Convention	The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333.
Conventional Weapons Convention	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 19 I.L.M. 1525.

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LAW OF WAR TRAINING

MAJ NEWTON

REFERENCES

1. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277, including the regulations thereto [*hereinafter* H.IV or H.R.].
2. Geneva Conventions Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [*hereinafter* G.C.].
3. DoD Directive 5100.77, DoD Law of War Program (1979).
4. Dept. of Army, Field Manual 100-5, Operations, Chapter 2, (14 June 1993) [*hereinafter* FM 100-5].
5. Dept. of Army, Field Manual 27-10, The Law of Land Warfare (18 July 1956) [*hereinafter* FM 27- 10].
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8. Dept. of Army, Training Circular No. 27-10-1, Selected Problems In The Law of War (26 June 1979) [*hereinafter* TC 27-10-1].
9. Dept. of Army, Training Circular No. 27-10-2, Prisoners of War (17 September 1991) [*hereinafter* TC 27-10-2].
10. Dept. of Army, Training Circular No. TC 27-10-3, Instructor's Guide - The Law of War (12 April 1985) [*hereinafter* TC 27-10-3].
11. Dept. of Navy, Marine Corps Order 3300.3, Marine Corps Law of War Program (2 August 1984)
12. Dept. of Army, Soldier Training Publication No. 21-1-ISMCT, Soldier's Manual of Common Tasks (1 October 1985) [*hereinafter* Soldier's Manual of Common Tasks].
13. United States Army, The Judge Advocate General's School, U.S. Army, Operational Law Handbook (JA 422) (7th ed.1997) [*hereinafter* OP. LAW HANDBOOK].
14. CJCSI 5810.01, Implementation of the DoD Law of War Program, 12 August 1996.

“ I don’t believe in a zero defects approach. The closest I come to a zero defects standard is the legal piece.”

***MG Michael A. Canavan,
JSOC Commander
25 April 1997***

INTRODUCTION.

A. Not Just An Extra Duty.

1. Operational Law Represents The First Opportunity for Junior Judge Advocates to Practice Operational Law. Operational Law Training, whether it be Code of Conduct, Law of War, Rules of Engagement, or Human Rights Familiarization training is an essential part of what judge advocates do. It represents the first opportunity for most judge advocates to become involved in the area of Operational Law. In addition, it provides an opportunity for young judge advocates to study this important area of their practice.
2. An Opportunity To Work With Commanders and Operational Planners/Trainers. One of the commander's most important responsibilities is to train his troops to fight wars and successfully execute any type of military operation. Operational law training provides judge advocates an opportunity to become involved in this function. In doing so, lawyers establish important relationships and gain the confidence of other key members of the commander's staff. Judge advocates that display enthusiasm and competence in the construction and execution of a training program forge contacts and build confidence with their client.

“I have been a Commander in every Major OOTW during the past four years. The one legal thing that sticks out in my mind is Human Rights. Soldiers need only a Basic understanding of human rights rules, but my lawyers had better know this stuff inside and out.”

Lt. Gen. Schoomaker, Commanding General
U.S. Army Special Operations Command
18 October 1996

II. THE ROLE OF THE JUDGE ADVOCATE.

- A. Generally. Military lawyers have performed remarkably well in the operational law arena because they have a firm grasp upon their role as members of the staff. Their efforts to establish operational law programs have benefited from their relationship with staff members and subordinate commanders.

- B. To the soldier - trainer. Operational lawyers should remember that they have an important role to play as a unit trainer. They should not, however, confuse this role with their role as advisor to the commander. The training program and training objectives are dictated by the commander. The nature of the training is based upon the advice given by the lawyer and decisions made by the commander. Obviously, the lawyer that has won the confidence of his client will receive valuable latitude in constructing a meaningful and successful operational training program.
- C. To the commander - advisor. Fortunately, most military lawyers quickly gain the reputation as one of the brightest members of the staff, and this reputation often serves as the foundation for building a training program. Conversely, the judge advocate that briefs his commander on his desire to construct a first rate operational law training program within the commander's unit will can the further confidence of the commander.
- D. Understanding Your Weaknesses. Although the commander, most members of his staff, subordinate commanders, and soldiers respect judge advocates; they also harbor suspicions that military lawyers have not endured the hardships of the field and many of the other experiences that harden soldiers into professional warriors. Although the goal of all Army judge advocates is to become soldiers that happen to be lawyers, the suspicion referred to above is based upon sound logic. Unlike line officers, military lawyers do not spend very much time in the field, training on military weapons systems and related equipment, or simply learning the art of soldiering. Soldiers and their leaders know this and it generates a suspicion that these "combat jags" are not true soldiers, and this creates a credibility gap. Judge advocates must accept this reality and work to reduce the credibility gap.

- E. Reducing The Credibility Gap. The best way to reduce the gap is to never offer the soldiers that you train any evidence that lends credence to their suspicion. You must, without exception, appear as a professional soldier. Your uniform, hair, grooming, and bearing must be flawless. Your command of military terms and vocabulary must be equally impressive. Finally, your knowledge of the unit's mission, past missions, place in history also serve to reduce the gap. For example, a military lawyer that walks into a battalion classroom and looks as professional (or more professional) as the company commander that introduces him begins his class with the respect that all officers in our Army automatically command. When that same lawyer punctuates his class with informed references to equipment and weapon systems organic to that unit he will find that his audience becomes more engaged with every reference and example that he provides. This is because he has increased the relevance of his class, while bolstering his own credibility. Finally, if that same lawyer has taken the time to read and integrate into his teaching plan examples from the unit's past operational successes, he will have once again magnified the value of his class.
- F. Mastering The Corporate Model. Recently, members of the Corps have engaged in a debate regarding what MG Michael Nardotti coined as the corporate model. General Nardotti proffers that the Corps should aspire to a corporate model. Others argue that the Army is nothing like Chrysler Corporation or IBM and that judge advocates must by definition be very different from corporate counsel. A review of the imperatives of a good corporation lawyer reflect that there may be something to the corporate model.
1. For example, a good IBM lawyer must understand his client's mission, goals, and problems. Similarly, he must be well versed in the client's personnel issues, its equipment and production techniques. The IBM lawyer must be fluent in the language of technology and automation. Finally, he must be able to grasp the major and subtle issues that confront the industry. In short, he must be *a corporate officer that just happens to be lawyer.*
 2. The obligation of the judge advocate is nearly identical to that of the corporation lawyer. He must understand the supported unit's mission. He must understand the tactics, techniques, and procedures of the Army and the supported unit. He must be fluent in the military vocabulary and understand the equipment and weaponry of his unit. Last, he must understand the motivations and imperatives of the military leader and the soldiers that are so ably led. In short, he must be *a soldier that just happens to be a lawyer.*

- G. Soldier - Lawyers and Training. The connection between lawyers who have a firm grasp on the profession of arms and good operational training is obvious. Training programs that are constructed by soldiers that happen to be lawyers will prove to be relevant, realistic, interesting, and dynamic.

III. THE TRAINING CONTINUUM.

- A. The Left End of The Continuum. All Army training occurs along a continuum. At one end of the continuum is ineffective training, done simply to satisfy unit training records. It is probably done with little or no thought, without prior planning, and under less than ideal training conditions. The judge advocate that receives the last minute phone call, at 0715, to provide a law of war class to a battalion of soldiers in the brigade basketball gym is the prime example of the shallow end of the training continuum. The trainer will not be prepared. The audience, having just finished physical training, will not be in the proper mode to receive information. Finally, the gym is hot and not designed for its acoustical characteristics. The result is bad training.
- B. The Right End of The Continuum. Training that occurs at the deep end of the training continuum is the product of a well thought out training program that required the lawyer to work with unit leaders and members of the commander's staff. It is part of an overall operational law training program. For example, it is a law of war class taught in a battalion classroom by the supported unit's own noncommissioned officers (that have been trained by the unit judge advocate). It is based upon a training product generated by the lawyer in coordination with unit leaders. The training product is also based upon the nature of the unit, its mission, and its recent operational and training history. Because of these elements it is relative and realistic. The result is good training.

IV. TRAIN IN THE CLASSROOM OR THE FIELD?

- A. Actually, a good training program offers training in both the classroom and the field environment. The most successful programs report that initial training is done in the classroom to small groups of soldiers. Level two training is done in a field environment. It is here where reinforcement and correction is made most effectively.

- B. Classroom training should be primarily conducted by the same group of professionals that conduct most of the Army's training: the Noncommissioned Officer (NCO). The operational law training program should provide for training the NCOs first. Judge advocates should conduct this training. Thereafter, judge advocates should continuously evaluate the program by dropping into classes and participating in the training. Many judge advocates recommend team teaching with NCOs as a method of evaluating how unit training is progressing.

V. RELEVANCE AND REALISM.

- A. Build Classes Around The Supported Unit's Mission and Mission Essential Task List (METL). Training that is not relevant to the training audience has no value. For example, if the training audience is made up of an aviation company, law of war training that is focused upon infantry tactics is not relevant and has no value. The best training is based upon familiar terms and mission tasks. This type of training permits soldiers to see the connection between teaching objectives and their assigned tasks.
- B. Use Scenarios. During both classroom and field training events, the use of scenarios allows soldiers to understand legal principles in the operational context. For example, an instructor can tell a classroom of soldiers that they must anticipate attack and respond with force only if they identify a threat that has either (1) been declared hostile, (2) commits a hostile act, or (3) manifests hostile intent. Only a small percentage of students will walk out of the classroom with a firm grasp of what the instructor was talking about. However, had the instructor expressed these principles in terms of real world scenarios, most of the students would have gained a good appreciation for the teaching points.

- C. An example of a Rules of Engagement Scenario. During a Peace Enforcement Operation a patrol of soldiers has frequently witnessed host nation police forces beating host nation civilians. They have been informed that the local police are very dangerous and to avoid encounters with them when possible. The soldiers have, however, a duty to intercede whenever they see an ongoing serious criminal act, such as aggravated assault. Today, they witness a local policeman beating a civilian with the butt of his rifle. As the U.S. patrol moves in, several policemen reach for their sidearms. How should the members of the U.S. patrol react? The answer is based upon the concept of hostile intent. Based upon the totality of the circumstances, the police officer has manifested hostile intent and the soldiers may now defend themselves using proportionate force (which may include deadly force). Scenarios like this provide an excellent springboard for discussion, wherein, soldiers can ask questions and gain a better understanding of the legal concepts that serve as the foundation for the training standards.
- D. Where Possible Use Existing Scenarios and Training Products. Although the prime directive of good training is making the training relevant by tailoring it to the individual unit, this can be done without creating an entirely new training product. The prudent judge advocate will call around to other units and ask for copies of operational law training packages (a number of units have very fine packages; i.e., 1st Armored Division and 82nd Airborne Division). In addition, there is a wealth of training materials found in existing Training Circulars and Pamphlets. Many of these publications are listed under the reference section on page one of this outline.
- E. Integrate Recent Training Events or Operations Into The Training Program. One of the best ways to make teaching points relevant is to connect them directly with events that the unit recently encountered during a recent field training exercise or actual operation. The student is able to see why the class is important and how it relates to their real world mission. For example, after discussing a recent training event with the supported unit's commander, a battery commander within Division Artillery, you learn that his unit accompanied deep maneuver forces through its self-propelled or towed capability beyond the Forward Line of Own Troops (FLOT). The battery was very vulnerable during this phase of the operation and moved frequently to prevent the enemy from detecting its exact location. A number of excellent law of war principles could be built into such a scenario. For instance, how should battery soldiers react to discovery by a local civilian, who might travel back to her home and report the unit's location to local authorities?

- F. Integrate Unit Weaponry and Equipment into the Training Event. By integrating equipment and weapons familiar to the training audience into training scenarios students immediately become interested in the class. Soldiers spend a great deal of time working with, maintaining, and using unit equipment and weapons. In most instances, soldiers feel that they own these systems and are proud of the capabilities and even the limitations of these items. Making reference to them during operational law training adds realism to the training and makes it more interesting for soldiers that spend most of their waking hours with these systems.
- G. Use role players.
- H. Evaluate. Establish an evaluation system with goals and milestones. Each soldier should understand whether or not their performance met training standards. Whenever possible, the GO/NO GO evaluation of a field exercise should be supplemented with a comprehensive classroom after action review where soldiers are walked through the training event and where appropriate responses are highlighted and substandard responses are discussed.

VI. WHAT DO WE TEACH?

- A. The Law of War: The Soldier's Rules. The Army has established a body of minimum knowledge required by all soldiers.¹ The following basic law of war rules, referred to as "The Soldier's Rules," are taught to all soldiers during their entry level training and again is reinforced by training in units.
 - 1. Soldiers fight only enemy combatants.
 - 2. Soldiers do not harm enemies who surrender. Disarm them and turn them over to your superior.
 - 3. Soldiers do not kill enemy prisoners of war.
 - 4. Soldiers collect and care for the wounded and sick, whether friend or foe.
 - 5. Soldiers do not attack medical personnel, facilities, or equipment.

¹ DEP'T OF ARMY, REGULATION 350-41, TRAINING IN UNITS, 14-1 (19 Mar 1993) [hereinafter AR 350-41].

6. Soldiers destroy no more than the mission requires.
7. Soldiers treat all civilians humanely.
8. Soldiers do not steal. Soldiers respect private property and possessions.
9. Do your best to prevent violations of the law of war; report all violations to your superior, a judge advocate, a chaplain, or provost marshal.

B. Rules of Engagement (ROE). During any type of operation knowledge of the rules of engagement is critical. This is particularly true for Operations Other Than War, where the right to use force is typically more restricted. A number of units have adopted standardized ROE training programs, which focus upon the self-defense measures contained in the CJCS Standing Rules of Engagement (SROE). These programs establish a base-line ROE training standard, which has the versatility to apply in any type of operation. Soldiers are trained to the baseline ROE and commanders and their staffs on the procedures for receiving, disseminating and supplementing ROE by using ROE conditions or ROECONS. I recommend that judge advocates integrate such a program into their overall operational law training program. The XVIII Airborne Corps recently adopted a standardized base-line ROE program, based upon the pneumatic RAMP. This is an excellent product and is attached to this outline.

C. Human Rights Familiarization. In OOTW, the restoration of basic human rights is often a key mission objective. In such an operation it is important that soldiers understand that they have a two prong responsibility. First, they must serve as a shining example of a nation which possesses a deep respect for individual human rights. They do this by understanding and conducting themselves in accordance with the basic human rights law. Second, they must be able to recognize human rights violations committed by host nation citizens and government agents (police officers), and know what action to take in regard to such violations. The basic rules are as follows:

1. Respect human life.
2. Treat all persons humanely.
3. Do not commit sexual abuse.

4. Do not torture.
 5. Do not take hostages.
 6. Report crimes and human rights violations to proper authorities.
 7. Avoid the unnecessary destruction of property.
- D. Code of Conduct Training.

VII. COMMAND INVOLVEMENT

- A. In planning.
- B. As Integrated Teachers.
- C. Training the Trainers.
- D. In Sponsoring and Lending Credibility To the Program

VIII. PRACTICE POINTERS.

- A. Have Faith in the Student.
- B. Be Enthusiastic - Be an Obvious Believer.
- C. Pose the Right Questions.
- D. Use History and Current Events.
- E. Make it Fun for the Student and Yourself.

- F. Recognize the Importance of your Subject.
- G. Be Relevant and Prepared or Be Somewhere Else.
- H. Stir Their Souls.

IX. CONCLUSION.

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THE UNITED NATIONS AND
LEGAL BASES FOR THE USE OF FORCE

CDR MARK E. NEWCOMB, JAGC, USN

REFERENCES

1. U.N. CHARTER.
2. U.N. GENERAL ASSEMBLY RESOLUTION 2625, DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS (1970).
3. U.N. GENERAL ASSEMBLY RESOLUTION 3314, DEFINITION OF AGGRESSION (1974).
4. War Powers Resolution, 50 U.S.C. sec. 1541-1548; Pub. L. No. 93-148 (1972).
5. Anthony Clark Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, 27 STANFORD J. INT'L L. 1 (1990).

X. INTRODUCTION

A. Historical Perspective of War

1. War is judged / analyzed on two separate levels:
 - a. First - the nation's rationale or justification for resort to force.
 - (1) *Jus ad bellum*
 - b. Second - the nation's method of waging war.
 - (1) *Jus in bello*: encompassing military necessity, discrimination / avoidance of unnecessary suffering, and proportionality.

2. Historical development.

a. A right of sovereignty: the “Just War:” period.

(1) Prerequisites to the “Just War”:

- (a) Just cause;
- (b) Just intent;
- (c) Last resort;
- (d) Legitimate authorization by the sovereign;
- (e) Reasonable hope of success.

(2) Uncontrolled sovereignty: “War as Fact”

- (a) War as an instrument of national policy; *Realpolitik*

(3) Movement towards the Modern Doctrine -
jus contra bellum

- (a) World War I and the League of Nations.
 - (i) Rejection of “self-help” as a means of settling disputes. Attempt to shift the competence to use force from individual states to a collective body.

(b) Treaty for the Renunciation of War - the Kellogg-Briand Pact.

(i) High Contracting parties condemn “recourse to war” for solution of international controversy and renounce warfare as an instrument of national policy and international relations.

(4) Post World War II.

(a) The San Francisco Convention (1945)

(b) Modern “Jus ad Bellum”

XI. USE OF FORCE AND THE UNITED NATIONS CHARTER

A. The United Nations Charter.

1. Preamble:

**We the peoples of the United Nations, determined to
save succeeding generations from the scourge of war ...
and for these ends
to unite our strength to *maintain international peace and security,*
and to ensure,
by the acceptance of principles and the institution of methods,
*that armed force shall not be used, save in the common interest...***

2. Article 1: “The purposes of the United Nations are:
... maintain international peace and security
... take effective collective measures for the prevention and
removal of threats to the peace, and for the suppression of
acts of aggression or other breaches of the peace ...”

3. Prohibitions on Use of Force:

- a. Article 2(3): “All Members shall *settle their international disputes by peaceful means* in such a manner that international peace and security, and justice, are not endangered.”
- b. Article 2(4): “All members shall *refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state*, or in any other manner inconsistent with the purposes of the United Nations.”
- c. UN General Assembly actions:
 - (1) Reaffirmation of general Charter principles:
UNGA Resolution 2625 (1970):
 - (a) Reaffirms duties of states (Members) - under both the Charter and customary international law:
 - (i) Duty not to use force or the threat of force against states;
 - (ii) Duty to settle disputes peacefully;
 - (iii) Duty not to interfere or intervene in domestic matters of states;
 - (iv) Duty to cooperate;
 - (v) Duty to ensure equal rights and self-determination of peoples;
 - (vi) Duty to preserve sovereign equality of states;
and

- (vii) Duty to fulfill Charter obligations in good faith.

(2) Defining Aggression: UNGA Resolution 3314 (1974).

- (a) Aggression: “ ... the *use of armed force by a state against the sovereignty, territorial integrity, or political independence of any state*, or in any other manner inconsistent with the purposes of the United Nations.”
- (b) Art. 2: first use of armed force by a State in contravention of the Charter is *prima facie* evidence of act of aggression.
- (c) Art 3: acts constituting flagrant aggression:
 - (i) Bombardment;
 - (ii) Blockade;
 - (iii) Land, sea or air attack;
 - (iv) Using armed forces of one state, which are located within the territory of another (receiving) state under agreement, in contravention of the terms of that agreement; or
 - (v) Allowing use of state territory, which is placed at the disposal of another state, to be used by that state for perpetration of an act of aggression against a third state.

XII. MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY: THE UNITED NATIONS SECURITY COUNCIL.

A. Role of the Security Council

1. Article 24: "... Members confer on the Security Council *primary responsibility* for the maintenance of international peace and security ..."
2. Article 25: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

B. Methods for Resolution of Controversy and Dispute

1. Chapter VI: Pacific Settlement of Disputes
 - a. Article 33. Obligates Members to seek peaceful settlement to any dispute and authorizes Security Council to call upon parties to settle.
 - b. Article 34. Authorizes the Security Council to investigate any dispute or situation to determine whether or not it is likely to endanger international peace and security.
 - c. Article 36. Authorizes the Security Council to make recommendations on procedures and methods for settlement of any dispute which has been referred to it by parties / Members.
 - d. Article 37. Authorizes the Security Council to make specific recommendations for resolution of the dispute where parties / Members have failed to do so under the provisions of Art. 36.

2. Chapter VII: Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression. (Enforcement Actions).
 - a. The Security Council may decide on *mandatory* non-military or military measures to maintain or restore international peace and security. NOTE: The Security Council is not empowered to intervene into matters that are essentially within the domestic jurisdiction of any State. (Art. 2(7)).
 - b. Article 39: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”
 - c. Article 41: Authorizes measures short of use of armed force / military intervention and allows UNSC to call upon all Members to apply such measures. *Includes, but is not limited to, “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”*
 - d. Article 42: Authorizes “*such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security*”, including “demonstrations, blockades, and other operations by air, sea or land forces, by Members of the United Nations.”
 - e. Article 43: Provides for special agreements between Members and the UN to provide armed forces, assistance, and facilities necessary for the purpose of maintaining international peace and security.

C. Regional Arrangements: Chapter VIII

1. Article 52 organizations.

a. OAS, OAU, WEU, CSCE, OECS

b. Distinguished from collective defense treaties.

(1) Collective defense agreements do not provide independent legal basis in the law for use of force.

2. Article 53 Enforcement Actions.

a. Require sanction of UNSC.

XIII. SELF-DEFENSE AND CUSTOMARY PRACTICE

A. Development of the Customary Right

1. Prerequisites / Criteria:

a. Necessity: peaceful means of resolution exhausted

(1) UN Charter, Art. 2(3).

b. Proportionality: force utilized must be limited in *scope*, *intensity*, and *duration* to that which is reasonably necessary to counter the attack or neutralize the threat.

c. Timeliness. Proximity to the hostile act.

- B. Anticipatory Self-Defense: Defensive action taken in response to an *imminent* armed attack by another state
1. *The Caroline Doctrine* (1837) - U.S. Secretary of State Daniel Webster: A claim to anticipatory self-defense must show “a necessity for self-defense that is instant, overwhelming, leaving no choice of means and no moment for deliberation.”
- a. Criteria:
- (1) Immediate / imminent threat.
 - (2) Necessity.
 - (3) Proportionality.
- b. Concerns:
- (1) Anticipatory self-defense as pretext.
 - (a) Fact specific nature of claim.
 - (2) Preventive uses of force [self-preservation] vis a vis preemptive action [anticipatory self-defense].
 - (3) Reprisal.
 - (a) Temporal element.
 - (b) Focus / purpose of response.
 - (c) Application of UNGA Res. 2625.
- C. Self-Defense and the Charter : the Post-Charter Paradigm

1. UN Charter, Article 51: “Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security.”
 - a. “...*if an armed attack occurs*...”
 - (1) Does Art. 51’s express language requires an actual armed attack before force may be used in self-defense?
 - (a) Majority view:
 - (b) Minority view:
 - b. “...*until the Security Council has taken measures necessary*”
 - (a) Does UNSC action extinguish a state / Member’s right to act unilaterally in self-defense?
2. Status of the law.
 - a. Generally accepted legal bases for use of force:
 - (1) Individual / national self-defense (UN Charter, Art. 51)
 - (a) *Anticipatory Self-defense*. (UN Charter + custom)
 - (2) Collective self-defense (UN Charter, Art. 51)
 - (3) Enforcement actions (UN Charter, Ch. VII)
 - (a) Regional (UN Charter, Art. 53).
 - (4) Peacekeeping (UN Charter, Ch. VI).

- (a) Regional (UN Charter, Art. 52).
 - (5) Protection of nationals (UN Charter, Art. 51).
 - (6) Suppression of Piracy (Custom).
 - (7) Invitation (Custom).
 - b. Controversial legal bases for use of force:
 - (1) Anticipatory Self-Defense.
 - (2) Peacetime Reprisal (Custom).
 - (3) Humanitarian Intervention (UN Charter, Treaty, and Custom).
 - (4) Self-Help (Custom).
3. Framework for analysis:
- a. Is there a violation of a legal obligation or right?
 - b. Has the UN Security Council taken action?
 - c. What purpose would armed response serve?
 - d. Is / was the response timely?
 - e. Is / was the response necessitated by circumstance?
 - f. Is / was the response proportionate to the attack or threat?

- g. Was the response / use of force reported to the UN Security Council?

XIV. DOMESTIC BASES FOR USE OF FORCE

A. U.S. Constitution

1. Legislative Powers (Article I)

- a. Provide for the Common Defense;
- b. Declare war;
- c. Raise and support Armies;
- d. Provide and maintain a Navy;
- e. Make rules for the Government and Regulation of the land and naval forces.

2. Executive Powers (Article II)

- a. The executive power shall be vested in the President;
- b. Commander in Chief.

B. The War Powers Resolution (1973).

1. History, background and purpose.

- a. “To fulfill the intent of the framers ...”

- b. Ensure “collective judgement” of the Executive and Legislative branches.
- 2. Reporting and consultation requirements.
 - a. Section 3: Consultation.
 - (1) “In every possible instance”
 - (2) *Before* introduction of armed forces into actual or imminent hostilities.
 - (3) Regular consultation thereafter.
 - b. Section 4: Reporting.
 - (1) Absent a declaration of war, events triggering WPR report:
 - (a) Introduction of troops into actual or imminent hostilities;
 - (b) Introduction of troops into a foreign country, equipped for combat; or
 - (c) Greatly enlarging the number of troops in a foreign country, equipped for combat.

(2) Within 48 hours of a triggering event, the President must report the following to both houses of Congress:

(a) The circumstances necessitating introduction of armed forces;

(b) The Constitutional and legislative authority for introduction of armed forces; and

(c) The estimated scope and duration of hostilities or deployment.

c. Section 5b: The 60 Clock

(1) Triggered by Section 4 report or Congressional demand for the same.

(2) The President must terminate the use of armed forces within 60 days after the Section 4 report is submitted, unless Congress has:

(a) Declared war;

(b) Authorized the use of forces;

(c) Specifically authorized extension of the deployment / use of forces; or

(d) Been unable to meet due to an attack upon the U.S.

- (3) The President may extend the 60 period - by 30 days - if he determines and certifies in writing that “unavoidable military necessity respecting the safety of United States armed forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.”
 - d. Section 5c: The concurrent resolution.
 - (1) Forcing the President to withdraw.
- 3. Executive Branch implementation of the WPR.
 - a. JCS review of deployment actions.
 - b. Referral to DoD General Counsel if report required.
 - c. DoD notifies / advises State Department. If report required, DoD General Counsel notifies SECDEF.
 - d. Reports “consistent with” WPR.

XV. CONCLUSION

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HISTORY OF THE LAW OF WAR

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XVI. INTRODUCTION.

A. OBJECTIVES:

1. Provide a foundation for understanding present law of war regimes.
2. Trace the historical evolution of laws related to the legitimacy and conduct of war.
3. Identify common historical themes which continue to support the validity of laws regulating warfare.

B. WHAT IS WAR? “[i]t is universally recognized that war is *a contention*, i.e. *a violent struggle through the application of armed force*.”

1. Some historical definitions of war include:

- a. "Armed conflict between societies."
 - b. "A conflict of great interests that cannot be resolved otherwise than by means of shedding blood."
 - c. "War is characterized by (1) military activities; (2) an accentuated political tension; (3) an abnormal law; (4) an intense political integration."
2. International Legal Definition: The Four Element Test.
- a. A contention;
 - b. Between at least two nation states;
 - c. Wherein armed force is employed
 - d. With an intent to overwhelm.
3. For purposes of international law, no state of war exists in the absence of any of these four elements.
- a. **EXAMPLE:** Operation JUST CAUSE, December 1989. The United States asserted, based on the invitation from the popularly elected Panamanian President Endara, that the operation was not a "war." Although U.S. forces fought the Panamanian Defense Force, based on this invitation there was no contention between two nation states.
4. Law of War Consequences.

- a. War versus Armed Conflict. Historically, only conflict meeting the four element test for “war” triggered law of war application. Accordingly, some nations asserted the law of war was not triggered by all instances of armed conflict. As a result, the applicability of the law of war depended upon the subjective national classification of a conflict.
- b. Post WW II response. Recognition of a state of war is no longer required to trigger the law of war. Instead, the law of war is applicable to any **international armed conflict**:
 - (1) “Any difference arising between two States and leading to the intervention of armed forces is an armed conflict . . . [i]t makes no difference how long the conflict lasts, or how much slaughter takes place.”
- c. U.S. Position: “The armed forces of the United States shall comply with the law of war in the conduct of military operations and related activity in armed conflict, **however such conflict is characterized.**” (DoD DIR. 5100.77).

XVII. LAW OF WAR: A SUMMARY OF HISTORY.

- A. Throughout history, the law focused on two primary issues related to war:
 - 1. Under what circumstances was the use of military power legally and morally justified. This is referred to as *Jus ad Bellum* (or Legal Basis for the Use of Force by contemporary military lawyers).
 - 2. What legal and moral restraints apply to the conduct of waging war. This prong is referred to as *Jus in Bello* (the Regulation of Hostilities or Hague/Geneva Law by contemporary military lawyers).

3. The concepts of *Jus ad Bellum* and *Jus in Bello* developed both unevenly and concurrently. For example, during the majority of the *Jus ad Bellum* period, most societies only dealt with rules concerning the legitimacy of using force. Once the conditions were present that justified war, there were often no limits on the methods used to wage war. At a certain point both theories began to evolve together.

B. THE TWO THEORIES.

1. *Jus ad Bellum*: Legitimate War. Law became an early player in the historical development of warfare. The earliest references to rules regarding war referred to the conditions which justified resort to war legally and morally.
 - a. Greeks: began concept of *Jus ad Bellum*, wherein a city state was justified in resorting to the use of force if a number of conditions existed (if the conditions existed the conflict was blessed by the gods and was just). In the absence of these conditions armed conflict was forbidden.
 - b. Romans: formalized laws and procedures which made the use of force an act of last resort. Rome dispatched envoys to the nations against whom they had grievances, and attempted to resolve differences diplomatically. The Romans also are credited with developing the requirement for declaring war. Cicero wrote that war must be declared to be just.
 - c. The ancient Egyptians and Sumerians (2nd millennium B.C.) generated rules defining the circumstances under which war might be initiated.
 - d. The ancient Hittites required a formal exchange of letters and demands before initiating war. In addition, no war could begin during planting season.
 - e. Deuteronomy 20. "Before attacking an enemy city make an offer of peace."

2. *Jus in Bello*: Regulation of Conduct During War. The second body of law that began to develop dealt with rules that control conduct during the prosecution of a war to ensure that it is legal and moral.
 - a. Ancient China (4th century B.C.). Sun Tzu's *The Art of War* set out a number of rules that controlled what soldiers were permitted to do during war:
 - (1) captives must be treated well and cared for; and
 - (2) natives within captured cities must be spared and women and children respected.
 - b. Ancient India (4th century B.C.). The Hindu civilization produced a body of rules codified in the *Book of Manu* which regulated in great detail land warfare.
 - c. Ancient Babylon (7th century B.C.). The ancient Babylonians treated both captured soldiers and civilians with respect in accordance with well established rules.

XVIII. THE ENTRANCE OF CONTEMPORARY LAW.

A. THE SOURCES OF THE LAW OF WAR.

1. There are two primary sources of contemporary law regulating the resort to and use of military force:
 - a. Customary International Law. Customary law is the body of unwritten and written rules that develop through the recognition and practice of nation states, based on a sense of legal obligation/compulsion. In general, this law binds all nations. Defining and obtaining state acceptance as to what practices fall into this category remains the primary weakness of customary law.

- b. Conventional Law. Obligations assumed by states through treaties or other international agreements. The substance of such agreements may reflect customary law, and therefore bind not only signatories, but all nations. This is particularly true in the case of the law of war. For instance, a number of treaties are said to be expressions of existing customary law.
 - (1) **EXAMPLE:** The 1929 Geneva Convention contained a *si omnes* clause, indicating it was applicable to a conflict only when all parties to the conflict were parties to the Convention. During the Nuremberg war crimes trials, several German defendants asserted this clause as a defense to violation of the Convention. In response, the tribunal concluded that the violated provisions of the Convention merely codified customary international law, and therefore this clause did not exempt parties to the conflict from compliance with those provisions.

B. THE UNIFYING THEMES OF THE LAW OF WAR.

- 1. Law exists to either (1) prevent conduct or, (2) control conduct. These characteristics permeate the law of war, as exemplified by the two prongs. *Jus ad Bellum* serves to prevent conduct, while *Jus in Bello* serves to regulate or control conduct.
- 2. Validity. Although critics of regulating warfare cite historic examples of violations of evolving laws of war, history provides the greatest evidence of the validity of this body of law.
 - a. History shows that in the vast majority of instances the law of war works. “Violated or ignored as they often are, enough of the rules are observed enough of the time so that mankind is very much better off with them than without them.”
 - b. History demonstrates that mankind has always sought to “diminish the corrosive effect of mortal combat on the participants,” and has come to regard war not as a state of anarchy justifying infliction of unlimited suffering, but as an unfortunate reality which must be governed by some rule of law.

- (1) This point is exemplified by Article 22 of the Hague Convention: “the right of belligerents to adopt means of injuring the enemy is not unlimited, and this rule does not lose its binding force in a case of necessity.”
 - (2) That regulating the conduct of warfare is ironically essential to the preservation of a civilized world was exemplified by General MacArthur, when in confirming the death sentence for Japanese General Yamashita, he wrote: “The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason of his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the fabric of international society.”
3. The trend toward regulation grew over time in scope and recognition. When considering whether these rules have validity, the student and the teacher (judge advocates teaching soldiers) must consider the objectives of the law of War.
 - a. The purpose of the law of war is to (1) integrate humanity into war and (2) serve as a tactical combat multiplier.
 - b. The validity of the law of war is best explained in terms of both objectives. For instance, many cite the German massacre at Malmedy as providing American forces with the inspiration to break the German advance during World War II’s Battle of the Bulge. Accordingly, observance of the law of war denies the enemy a rallying cry fight against difficult odds.

XIX. THE HISTORICAL PERIODS.

A. THE JUST WAR PERIOD.

1. This period ranged from 335 B.C. to about 1800. The primary tenant of the period was determination of a “just cause” as a condition precedent to the use of military force.

2. Just Conduct Valued Over Regulation of Conduct. The law during this period focused upon the first prong of the law of war (*Jus ad Bellum*). If the reason for the use of force was considered to be just, whether the war was prosecuted fairly and with humanity was not a significant issue.
3. Early Beginnings: Just War Closely Connected to Self-Defense.
 - a. Aristotle (335 B.C.) wrote that war should only be employed to (1) prevent men becoming enslaved, (2) to establish leadership which is in the interests of the led, (3) or to enable men to become masters of men who naturally deserved to be enslaved.
 - b. Cicero refined Aristotle's model by stating that "the only excuse for going to war is that we may live in peace unharmed...."
4. The Era of Christian Influence: Divine Justification.
 - a. Early church leaders forbade Christians from employing force even in self-defense. This position became less and less tenable with the expansion of the Christian world.
 - b. Church scholars later reconciled the dictates of Christianity with the need to defend individuals and the state by adopting a *Jus ad Bellum* position under which recourse to war was just in certain circumstances (6th century A.D.).
5. Middle Ages. Saint Thomas Aquinas (12th century A.D.) (within his *Summa Theologica*) refined this "just war" theory when he established the three conditions under which a just war could be initiated:
 - a. with the authority of the sovereign;
 - b. with a just cause (to avenge a wrong or fight in self-defense); and

- c. so long as the fray is entered into with pure intentions (for the advancement of good over evil). The key element of such an intention was to achieve peace. This was the requisite “pure motive.”

- 6. Juristic Model. Saint Thomas Aquinas' work signaled a transition of the Just War doctrine from a concept designed to explain why Christians could bear arms (apologetic) towards the beginning of a juristic model.
 - a. The concept of “just war” was initially enunciated to solve the moral dilemma posed by the adversity between the Gospel and the reality of war. With the increase in the number of Christian nation-states, this concept evolved an increasing concern with regulating war for more practical reasons.
 - b. The concept of just war was being passed from the hands of the theologians to the lawyers. Several great European jurists emerged to document customary laws related to warfare. Hugo Grotius (1583-1645) produced the most systematic and comprehensive work, *ON THE LAW OF WAR AND PEACE*. His work is regarded as the starting point for the development of the modern law of war.
 - c. While many of the principles enunciated in this work were consistent with church doctrine, Grotius boldly asserted a non-religious basis for this law. According to Grotius, the law of war was not based on divine law, but on recognition of the true natural state of relations among nations. Thus, the law of war was based on natural, and not divine law.

- 7. The End of the Just War Period. By the time the next period emerged, the Just War Doctrine had generated a widely recognized set of principles that represented the early customary law of war. The most fundamental of these principles are:
 - a. A decision to wage war can be reached only by legitimate authority (those who rule a sovereign).

- b. A decision to resort to war must be based upon a need to right an actual wrong, in self-defense, or to recover wrongfully seized property.
- c. The intention must be the advancement of good or the avoidance of evil.
- d. In war, other than in self-defense, there must be a reasonable prospect of victory.
- e. Every effort must be made to resolve differences by peaceful means, before resorting to force.
- f. The innocent shall be immune from attack.
- g. The amount of force used shall not be disproportionate to the legitimate objective.
- h. Emergence of a Chivalric Code. *Jus in Bello*. The chivalric rules of fair play and good treatment only applied if the war was just to begin with.
 - (a) Victors were entitled to spoils of war, only if war was just.
 - (b) Forces prosecuting an unjust war were not entitled to demand *jus in bello* during the course of the conflict.
 - (c) Red Banner of Total War. Signaled a party's intent to wage absolute war (Joan of Arc announced to British "no quarter will be given").

B. THE WAR AS FACT PERIOD (1800-1918).

1. Generally. Arose based upon the rise of the nation state as a tool of foreign relations. Modern powers transformed war from a tool to achieve justice to a tool to pursue national policy objectives.
 - a. Just War Notion Pushed Aside. Natural or moral law principles replaced by positivism which reflected the rights and privileges of the modern nation state. Law is based not on some philosophical speculation, but on rules emerging from the practice of states and international conventions.
 - b. Basic Tenet: since each state is sovereign, and therefore entitled to wage war, there is no international legal mandate, based on morality or nature, to regulate resort to war (realpolitik replaces justice as reason to go to war). War is (based upon whatever reason) a legal and recognized right of statehood. In short, if use of military force would help a nation state achieve its policy objectives, then force may be used.
 - c. Clausewitz. This period was dominated by the realpolitik of Clausewitz. He characterized war as a continuation of a national policy that is directed at some desired end. Thus, a state steps from diplomacy to war, not always based upon a need to correct an injustice, but as a logical and required progression to achieve some policy end.
 - d. Things to Come. The War as Fact Period appeared as *a dark era for the rule of law*. Yet, a number of significant developments signaled the beginning of the next period:
 - (1) With war a recognized and legal reality in the intercourse of nations, the focus on mitigating the impact of war emerged.
 - (a) Solferino (Henry Dunant's graphic depiction of the bloodiest battles of Franco-Prussian War). His work served as the impetus for the creation of the International Committee of the Red Cross and the negotiation of the First Geneva Convention in 1864.

- (b) Francis Lieber. Instructions To Armies in the Field (1863). First modern restatement of the law of war issued in the form of General Order 100 to the Union Army during the American Civil War.
 - (c) International Revulsion of General Sherman's "War is Hell" Total War. Sherman was very concerned with the morality of war. His observation that war is hell demonstrates the emergence and reintroduction of morality. However, as his March to the Sea demonstrated, Sherman only thought the right to resort to war should be regulated. Once war had begun, he felt it had no natural or legal limits. In other words he only recognized the first prong (*Jus ad Bellum*) of the law of war.
 - (d) First Geneva Convention (1864).
- 2. Foundation for Treaty Period Laid. Based on the "positivist" view, the best way to reduce the uncertainty attendant with conflict was to codify rules regulating this area.
 - a. Intellectual focus began shift toward minimizing resort to war and/or mitigating the consequences of war.
 - b. **EXAMPLE:** National leaders began to join the academics in the push to control the impact of war (Czar Nicholas and Theodore Roosevelt pushed for the two Hague Conferences that produced the Hague Conventions and Regulations).

C. JUS CONTRA BELLUM PERIOD.

- 1. Generally. World War I represented a significant challenge to the validity of the "war as fact" theory.

- a. In spite of the moral outrage directed towards the aggressors of that war, legal scholars unanimously rejected any assertion that initiation of the war constituted a breach of international law.
 - b. World leaders struggled to give meaning to a war of unprecedented carnage and destruction. The “war to end all wars” sentiment manifested itself in a shift in intellectual direction leading to the conclusion that aggressive use of force must be outlawed.
2. *Jus ad Bellum* Changes Shape. Immediately before this period began, the Hague Conferences (1899-1907) produced the Hague Conventions, which represented the last multilateral law that recognized war as a legitimate device of national policy. While Hague law concentrates on war avoidance and limitation of suffering during war, this period saw a shift toward an absolute renunciation of aggressive war.
- a. League of Nations. First time in history that nations agreed upon an obligation under the law to not resort to war to resolve disputes or to secure national policy goals (Preamble). The League was set up as a component to the Treaty of Versailles, largely because President Wilson felt that the procedural mechanisms put in place by the Covenant of the League of Nations would force delay upon nations bent on war. During these periods of delay peaceful means of conflict management could be brought to bear.
 - b. Eighth Assembly of League of Nations: banned aggressive war (questionable legal effect of resolution). However, the League did not attempt to enforce this duty (except as to Japan's invasion of Manchuria in 1931).
 - c. Kellogg-Briand Pact (1928). Officially referred to as the Treaty for the Renunciation of War, it banned aggressive war. This is the point in time generally thought of as the "quantum leap." **For the first time, aggressive war is clearly and categorically banned.**
 - (1) In contradistinction from the post WW I period, this treaty established an international legal basis for the post WW II prosecution of those responsible for waging aggressive war.

d. Current Status of Pact. This treaty remains in force today. Virtually all commentators agree that the provisions of the treaty banning aggressive war have ripened into customary international law.

3. Use of force in self-defense remained unregulated. No law has ever purported to deny a sovereign the right to defend itself. Some commentators stated that the use of force in the defense is not war. Thus, war has been banned altogether.

D. POST WORLD WAR II PERIOD.

1. Generally. The Procedural requirements of the Hague Conventions did not prevent World War I; just as the procedural requirements of the League of Nations and the Kellogg-Briand Pact did not prevent World War II. World powers recognized the need for a world body with greater power to prevent war, and international law that provided more specific protections for the victims of war.

2. The London Charter (Nuremberg, Tokyo, and Manila Tribunals). The trials of those who violated international law during World War II demonstrated that another quantum leap had occurred since World War I.

a. Reinforced tenants of *Jus ad Bellum* and *Jus in Bello*, and ushered in the era of “universality,” establishing the principle that all nations are bound by the law of war based on the theory that law of war conventions merely reflect customary international law.

b. World focused on ex post facto problem during prosecution of war crimes. The universal nature of law of war prohibitions, and the recognition that they were at the core of international legal values (*jus cogens*), resulted in the legitimate application of those laws to those tried with violations.

E. The United Nations Charter. Continues shift to outright ban on war. Extended ban to not only war, but through Article 2(4), also "the **threat** or use of force."

1. Early Charter Period. Immediately after the negotiation of the Charter in 1945, many nations and commentators assumed that the absolute language in the Charter's provisions permitted the use of force only if a nation had already suffered an armed attack.
2. Contemporary Period. Most nations now agree that a nation's ability to defend itself is much more expansive than the provisions of the Charter seem to permit based upon a literal reading. This view is based on the conclusion that the inherent right of self-defense under international law was **supplemented**, and not **displaced** by the Charter. This remains a controversial issue.

F. Geneva Conventions (1949).

1. Generally.
 - a. "War" v. "Armed Conflict." Article 2 common to all four Geneva Conventions ended this debate. Article 2 asserts that the law of war applies in any instance of international armed conflict.
 - b. Four Conventions. A comprehensive effort to protect the victims of war.
 - c. Birth of the Civilian's Convention. A post war recognition of the need to specifically address this class.
2. The four conventions are considered customary international law. This means even if a particular nation has not ratified the treaties, that nation is still bound by the principles within each of the four treaties because they are merely a reflection of customary law that all nations states are already bound by.
3. Concerned with national and not international forces? In practice, forces operating under U.N. control comply with the Conventions.

4. Clear shift towards a true humanitarian motivation: “the Conventions are coming to be regarded less and less as contracts on a basis of reciprocity concluded in the national interest of each of the parties, and more and more as solemn affirmations of principles respected for their own sake . . .”
5. The 1977 Protocols.
 - a. Generally. These two treaties were negotiated to supplement the four Geneva Conventions. The United States has not yet ratified either treaty.
 - b. Protocol I. Effort to supplement rules governing international armed conflicts.
 - c. Protocol II. Effort to extend protections of conventions to internal conflicts.

XX. THE U.S. LAW OF WAR PROGRAM

- A. Current program is based upon event that occurred during the Viet Nam War (My Lai Massacre).
- B. The foundational document for the U.S. Law of War Program is DoD Directive 5100.77. Mandates compliance with all customary and convention based laws of war during any armed conflict.

XXI. WHY REGULATE WARFARE?

1. Motivates the enemy to observe the same rules.
2. Motivates the enemy to surrender.
3. Guards against acts that violate basic tenets of civilization.

- a. Protects against unnecessary suffering.
 - b. Safeguards certain fundamental human rights.
- 4. Provides advance notice of the accepted limits of warfare.
 - 5. Reduces confusion and makes identification of violations more efficient.
 - 6. Helps restore peace.

XXII. CONCLUSION.

“Wars happen. It is not *necessary* that war will continue to be viewed as an instrument of national policy, but it is likely to be the case for a very long time. Those who believe in the progress and perfectibility of human nature may continue to hope that at some future point reason will prevail and all international disputes will be resolved by nonviolent means . . . Unless and until that occurs, **our best thinkers must continue to pursue the moral issues related to war.** Those who romanticize war do not do mankind a service; those who ignore it abdicate responsibility for the future of mankind, a responsibility we all share even if we do not choose to do so.”

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LEGAL FRAMEWORK OF THE
LAW OF WAR

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XXIII.TEACHING OBJECTIVES.

- A. Become familiar with the “language” of the law.
- B. Understand how the law of war is “triggered.”
- C. Become familiar with the role of the 1977 Protocols to the Geneva Conventions of 1949.
- D. Be able to distinguish “humanitarian” law from human rights law.

XXIV. THE LANGUAGE OF THE LAW. THE FIRST STEP IN UNDERSTANDING THE LAW OF WAR IS TO UNDERSTAND THE “LANGUAGE” OF THE LAW. THIS REFERS TO UNDERSTANDING SEVERAL KEY TERMS AND CONCEPTS THAT ARE WOVEN THROUGH THIS BODY OF LAW.

A. Sources of Law.

1. Customary International Law. This can be best understood as the “unwritten” rules that bind **all** members of the community of nations. Many principles of the law of war fall into this category of international law.
2. Conventional International Law. This term refers to codified rules binding on nations based on express consent. The term “treaty” best captures this concept, **although other terms are used to refer to these: Convention, Protocol, and Attached Regulations.**
 - a. Norms of customary international law can either be codified by subsequent treaties, or emerge out of new rules created in treaties.
 - b. Many law of war principles are both reflected in treaties, and considered customary international law. **The significance is that once a principle attains the status of customary international law, it is binding on all nations, not just treaty signatories.**

B. The “Big Three.” While there are numerous law of war treaties in force today, the “three” that provide the vast majority of regulation are: the **Hague Convention of 1907 (and Annexed Regulations), the Four Geneva Conventions of 1949, and the 1977 Protocols to the 1949 Geneva Conventions.**

1. **The Targeting Method.** This prong of the law of war is focussed on regulating the **methods and means** of warfare, *i.e.* tactics, weapons, and targeting decisions.

- a. This method is exemplified by the Hague law, consisting of the various Hague Conventions of 1899 as revised in 1907, plus the 1954 Hague Cultural Property Convention and the 1980 Conventional Weapons Convention.
- 2. **The Protect and Respect Method.** This prong of the law of war is focussed on establishing non-derogable protections for the “victims of war.”
 - a. This method is exemplified by the 4 Geneva Conventions of 1949. Each of these four “treaties” is devoted to protecting a specific category of war victims:
 - (1) GW: Wounded and Sick in the Field.
 - (2) GWS: Wounded, Sick, and shipwrecked at Sea.
 - (3) GP: Prisoners of War.
 - (4) GC: Civilians.
 - b. The Geneva Conventions entered into force on 21 October 1950. The President transmitted the Conventions to the United States Senate on 26 April 1951. The United States Senate gave its advice and consent to the Geneva Conventions on 2 August 1955.
- 3. The “Intersection.” In 1977, two treaties were created to “supplement” the 1949 Geneva Conventions. These treaties are called the 1977 Protocols (I & II).
 - a. While the purpose of these “treaties” was to supplement the Geneva Conventions, they in fact represent a mix of both the Respect and Protect method, and the Targeting method.
 - b. Unlike The Hague and Geneva Conventions, the U.S. has never ratified either of these Protocols.

C. Key Terms.

1. Part, Section, Article . . . Treaties, like any other “legislation,” are broken into sub-parts. In most cases, the **Article** represents the specific substantive provision.
2. “Common Article.” This is a critical term used in the law of war. It refers to a finite number of articles that **are identical in all four of the 1949 Geneva Conventions**. Normally these related to the scope of application and parties obligations under the treaties. Some of the Common Articles are identically numbered, while others are worded virtually the same, but numbered differently in various conventions. For example, the article dealing with special agreements is article 6 of the first three conventions, but article 7 of the Fourth Convention.
3. Treaty Commentaries. These are works by official recorders to the drafting conventions for these major law of war treaties (Jean Pictet for the 1949 Geneva Conventions). These “Commentaries” provide critical explanations to many treaty provisions, and are therefore similar to “legislative history” in the domestic context.

D. Army Publications. There are three primary Army sources that reflect the rules that flow from “the big three:”

1. FM 27-10: The Law of Land Warfare. This is the “MCM” for the law of war. It is organized functionally based on issues, and incorporates rules from multiple sources.
2. DA Pam 27-1. This is a verbatim reprint of The Hague and Geneva Conventions.
3. DA Pam 27-1-1. This is a verbatim reprint of the 1977 Protocols to the Geneva Conventions.

XXV. HOW THE LAW OF WAR IS TRIGGERED.

- A. The Barrier of Sovereignty. Whenever international law operates to regulate the conduct of a state, it must “pierce” the shield of sovereignty.
 - 1. Normally, the concept of sovereignty protects a state from “outside interference with internal affairs.” This is exemplified by the predominant role of domestic law in internal affairs.
 - 2. However, in some circumstances, international law “pierces the shield of sovereignty, and displaces domestic law from its exclusive control over issues. The law of war is therefore applicable **only after the requirements for piercing the shield of sovereignty have been satisfied.**
 - 3. The law of war is a body of international law intended to dictate the conduct of state actors (combatants) during periods of conflict.
 - a. Once triggered, it therefore intrudes upon the sovereignty of the regulated state.
 - b. The extent of this “intrusion” will be contingent upon the nature of the conflict.
- B. The Triggering Mechanism. The law of war includes a standard for when it becomes applicable. This standard is reflected in the Four Geneva Conventions.
 - 1. Common Article 2 -- International Armed Conflict: “[T]he **present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.**”
 - a. This is a true *de facto* standard. The subjective intent of the belligerents is irrelevant. According to the Commentary, the law of war applies to: **“any difference arising between two States and leading to the intervention of armed forces.”**

- b. Article 2 effectively requires that the law be applied broadly and automatically from the inception of the conflict.² The following two facts result in application of **the entire body of the law of war**:
 - (1) A dispute **between states, and**
 - (2) **Armed conflict** (see FM 27-10, paras. 8 & 9).
 - (a) De facto hostilities are what are required. The drafters deliberately avoided the legalistic term war in favor of the broader principle of armed conflict. According to Pictet, this article was intended to be broadly defined in order to expand the reach of the Conventions to as many conflicts as possible.
- c. Exception to the "state" requirement: Conflict between a state and a rebel movement recognized as belligerency.
 - (1) Concept arose as the result of the need to apply the Laws of War to situations in which rebel forces had the de facto ability to wage war.
 - (2) Traditional Requirements:
 - (a) Widespread hostilities - civil war.
 - (b) Rebels have control of territory and population.
 - (c) Rebels have de facto government.

² HOWARD S. LEVIE, *THE CODE OF INTERNATIONAL ARMED CONFLICT* 11 (1986). See also Richard R. Baxter, *The Duties of Combatants and the Conduct of Hostilities (Law of the Hague)*, in *INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW* 97 (1988).

- (d) Rebel military operations are conducted under responsible authority and observe the Law of War.
 - (e) Recognition by the parent state or another nation.
- (3) Recognition of a belligerent triggers the application of the Law of War, including The Hague and Geneva Conventions. The practice of belligerent recognition is in decline in this century. Since 1945, full diplomatic recognition is generally extended either at the beginning of the struggle or after it is successful (EX: The 1997 recognition of Mr. Kabila in Zaire).

- d. Controversial expansion of Article 2 -- Protocol I Additional (1977).
 - (1) Expands Geneva Conventions application to conflicts previously considered internal ones: "[A]rmed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination." Art 1(4), GPI.
 - (2) U.S. has not yet ratified this convention because of objections to article 1(4) and other articles. The draft of Protocol I submitted by the International Committee of the Red Cross to the 1974 Diplomatic Conference did not include the expansive application provisions.
 - e. Termination of Application (Article 5, GWS and GPW; Article 6, GC).
 - (1) Final repatriation (GWS, GPW).
 - (2) General close of military operations (GC).
 - (3) Occupation (GC) -- The GC applies for one year after the general close of military operations. In situations where the Occupying Power still exercises governmental functions, however, that Power is bound to apply for the duration of the occupation certain key provisions of the GC.
2. **The Conflict Classification Prong of Common Article 3** -- Conflicts which are not of an international character: "Armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . ."
- a. These types of conflicts make up the vast bulk of the ongoing conflicts.

- b. Providing for the interjection of international regulation into a purely internal conflict was considered a monumental achievement for international law in 1949. **But, the internal nature of these conflicts explains the limited scope of international regulation.**
 - (1) Domestic law still applies - guerrillas do not receive immunity for their war-like acts, as would such actions if committed during an international armed conflict.
 - (2) Lack of effect on legal status of the parties. This is an essential clause without which there would be no provisions applicable to internal armed conflicts within the Conventions. Despite the clear language, states have been reluctant to apply Article 3 protections explicitly for fear of conferring a degree of international legitimacy on rebels.
- c. What is an “internal Armed Conflict?” Although no objective set of criteria exist for determining the existence of a non-international armed conflict, Pictet lists several suggested criteria:
 - (1) The rebel group has an organized military force under responsible command, operates within a determinate territory, and has the means to respect the Geneva Conventions.
 - (2) The legal Government is obliged to have recourse to the regular military forces against the rebels, who are organized and in control of a portion of the national territory.
- d. Protocol II, which was intended to supplement the substantive provisions of Common Article 3, formalized the criteria for the application of that convention to a non-international armed conflict.
 - (1) Under responsible command.

- (2) Exercising control over a part of a nation so as to enable them to carry out sustained and concerted military operations and to implement the requirements of Protocol II.

C. What is the Relationship with Human Rights?

1. Human Rights Law refers to a totally distinct body of international law, intended to protect individuals from the arbitrary or cruel treatment of governments **at all times**.
2. While the **substance** of human rights protections may be synonymous with certain law of war protections, **it is critical to remember these are two distinct bodies of international law. The law of war is triggered by conflict. No such trigger is required for human rights law.**
 - a. These two bodies of international law are easily confused, especially because of the use of the term “humanitarian law” to describe certain portions of the law of war.

D. How do the Protocols fit in?

1. As indicated, the 1977 Protocols to the Geneva Conventions of 1949 are supplementary treaties. Protocol I is intended to supplement the law of war related to international armed conflict, while Protocol II is intended to supplement the law of war related to internal armed conflict. Therefore:
 - a. When you think of the law related to international armed conflict, also think of Protocol I;
 - b. When you think of the law related to internal armed conflict, also think of Protocol II.
2. Although the U.S. has never ratified either of these Protocols, there relevance continues to grow based on several factors:

- a. The U.S. has stated it considers many provisions of Protocol I, and all of Protocol II, to be binding customary international law.
- b. The argument that the entire body of Protocol I has attained the status of customary international law continues to gain strength.
- c. These treaties bind virtually all of our coalition partners.
- d. U.S. policy is to comply with Protocol I and Protocol II whenever feasible.

XXVI. OTHER KEY LAW OF WAR CONCEPTS.

- A. Protected Person. This is a legal “term of art” under the law of war. It refers to an individual vested with the maximum benefit under a given Geneva Convention. Each Convention defines which individuals fall within this category.
- B. Protecting Power. This refers to an agreed upon neutral state responsible for monitoring compliance with the Geneva Conventions and Protocols. Such agreements are rarely reached.
- C. Combatant Immunity. Perhaps the greatest benefit granted to combatants by the law of war, it refers to the immunity afforded by international law for warlike acts committed during international armed conflict. There are two critical caveats:
 - 1. This immunity is not “absolute.” It extends only to acts that are consistent with the law of war. Therefore, a combatant who violates the law of war receives no immunity for that conduct.
 - 2. Combatant Immunity applies **only to international armed conflict**. The inability of international law to extend combatant immunity into internal armed conflicts is perhaps the greatest manifestation of the limited scope of law of war regulation during internal conflicts.

- D. Reprisal. "[A]cts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war, for the purpose of enforcing future compliance with the recognized rules of civilized warfare." [Para. 497, FM 27-10]
1. The concept of reprisal is considered the one true "self-help" mechanism built into the law of war.
 2. The right of reprisal has been severely restricted by Protocol I. This was a major motivation behind the U.S. decision not to ratify this treaty.
- E. War Crime. While war "legalizes" many acts that would be unlawful in peacetime, it does not "legalize" everything unlawful in peacetime. War is not a license to kill, but a limited authorization to kill. War crimes are simply those acts that are unlawful in peacetime, and remain unlawful in wartime.
- F. Special Agreements. These are agreements the parties concluded during actual hostilities. The drafters of the Conventions recognized that they could not envision every circumstance that would arise regarding POWs, wounded and sick, and civilians. Thus, they sanctioned the use of special agreements.
- G. Grave Breaches of the Geneva Conventions: violations of the law of war involving any of the following acts, if committed against persons or property **protected by the Conventions**: willful killing, torture or inhumane treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, compelling a POW or protected civilian to serve in the armed force of a hostile power, depriving a POW or protected civilian of the rights of fair or regular trial as prescribed in the Conventions, unlawful deportation or transfer or unlawful confinement of a protected civilian, taking hostages.
- H. Respect for the Conventions (Common Article 1). Establishment of the basic obligation of signatories of the Geneva Conventions to implement the provisions. The term "respect" was intended to emphasize the humanitarian and unilateral nature of the obligation undertaken by Parties to the Conventions to comply with its provisions.

1. The drafters intended "ensure respect for" to advise the Parties of their continuing obligation to oversee the effective implementation of the Conventions. The term has also been interpreted in the Commentary to include an obligation on the Parties to see that other Parties are complying with the Conventions.³

³ In May 1983, the ICRC appealed to the Parties to the Geneva Conventions to bring influence to bear on both Iran and Iraq to better comply with the Law of War during their ongoing conflict. GEOFFREY BEST, *LAW AND WAR SINCE 1945* 146 (1994).

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WAR CRIMES AND COMMAND RESPONSIBILITY

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REFERENCES

1. U.S. Const. art. I, § 8, cls. 10 & 14, art. I, § 10, art. VI.
2. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, arts. 49-51, 6 U.S.T. 3114, 75 U.N.T.S. 31, [hereinafter GWS].
3. Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, arts. 50-52, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GWS Sea].
4. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 102, 105-08, 129-131, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].
5. Geneva Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, arts. 146-148, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC].
6. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature Dec. 12, 1977, U.N. Doc. A/32/144, Annex I, arts. 85, 86, 87, reprinted in DEP'T OF ARMY, PAMPHLET 27-1-1 [hereinafter DA PAM 27-1-1, Protocol I].
7. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 3, 36 Stat. 2277, 2290, 205 Consol. T.S. 277, 284 [hereinafter H IV].
8. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD OF 12 AUGUST 1949 AT 351-73 (JEAN S. PICTET ED., 1952) [hereinafter I PICTET].
9. UCMJ arts. 18, 21, 92 (1988).
10. Manual For Courts-Martial, United States, pt. I, & 2, R.C.M. 201(f)(1)(B), 201(g), R.C.M. 307(c)(2), R.C.M. 916 (1984).

11. **DEP'T OF DEFENSE, DIRECTIVE 5100.77, DoD LAW OF WAR PROGRAM, && C.3. & E.2.e.(3) (July 10, 1979) [hereinafter DOD DIR. 5100.77].**
12. **DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, ch. 8 (18 July 1956) [hereinafter FM 27-10].**
13. **DEP'T OF ARMY, PAMPHLET 27-161-2, INTERNATIONAL LAW, ch. 8 (23 Oct. 1962). [hereinafter DA PAM 27-161-2].**
14. **International Military Tribunal, Trial of the Major War Criminals (1947) (42 volumes).**
15. **Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1950) (15 volumes) [hereinafter Trials of War Criminals].**
16. **United Nations War Crimes Commission, Law Reports of Trials of War Criminals (1948) (15 volumes).**
17. **United Nations War Crimes Commission, History of the United Nations War Crimes Commission (1948).**

18. U.N. S.C.Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N.Doc. S/RES/808 (1993).
19. Report of the Secretary-General Pursuant to Para. 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159 (1993)(hereinafter Rept.of Secretary- General)
20. Rules of Procedure & Evidence, Int'l Crim. Trib.-Yugo since 1991, Seventh Session, the Hague, U.N. Doc. IT/32/Rev. 5 (June 15, 1995).
21. U.N. DOC. S/RES/955(1994), 33 I.L.M. 1598, Nov.8, 1994, (hereinafter Rwanda Statute).
22. 18 U.S.C. 2441 (War Crimes Act of 1997).
23. <http://www.igc.apc.org/tribunal>; <http://www.un.org/icty>.

XXVII.INTRODUCTION. After this block of instruction, the student will be familiar with the following:

- A. The history of the law of war as it pertains to war crimes and war crimes prosecutions.
- B. The types of acts that constitute war crimes.
- C. United States treaty and other obligations with respect to war crimes, as well as legislation and executive branch policies implementing those obligations.
- D. Under what jurisdiction, in what forum, and subject to what defenses war crimes may be prosecuted.

XXVIII.HISTORY OF WAR CRIMES AND WAR CRIMES

PROSECUTIONS. Trials of individuals for specific violations of the laws or customs of war have a long history.

- A. The Scottish Wars of Independence From England. Scottish national hero Sir William Wallace was tried in England in 1305 for the wartime murder of civilians. *See, e.g.,* G.W.S. BARROW, ROBERT BRUCE 203 (1965) (reporting that Sir Wallace allegedly spared "neither age nor sex nor nun").

- B. The American War of Independence. The most frequently punished violations were those committed by forces of the two armies against the persons civilian inhabitants and their property. Trials consisted of courts-martial convened by commanders of the offenders. *See generally* George L. Coil, *War Crimes of the American Revolution*, 82 Mil. L. Rev. 171, 173-81 (1978).
- C. The American Civil War. In 1865, Captain Henry Wirz, a former Confederate officer and commandant of the Andersonville, Georgia prisoner of war camp, was tried and convicted by a Federal military tribunal and was executed for murdering and conspiring to ill-treat Federal prisoners of war. *See, e.g.*, J. MCELROY, *ANDERSONVILLE* (1879); W.B. HESSELTINE, *CIVIL WAR PRISONS* (1930).
- D. The Anglo-Boer War. In 1902, British courts-martial tried Boers for acts contrary to the usages of war. *See generally* THE MILNER PAPERS: SOUTH AFRICA, 1897-1899, 1899-1905 (1933).
- E. World War I. Because of German resistance to the extradition--under the 1919 Versailles peace treaty--of persons accused of war crimes, the Allies agreed to permit the cases to be tried by the supreme court of Leipzig, Germany. The accused were treated as heroes by the German press and public, and many were acquitted despite strong evidence of guilt. *See, e.g.*, DA PAM 27-161-2 at 221.
- F. World War II. Victorious allied nations undertook an aggressive program for the punishment of war criminals. This included Trials of 24 senior German leaders (in Nuremberg) and 28 senior Japanese leaders (in Tokyo) before specially created International Military Tribunals; Twelve subsequent trials of other German leaders and organizations in Nuremberg under international authority and before panels of civilian judges; Thousands of trials prosecuted in various national courts, many of these by British military courts and U.S. military commissions. *See, e.g.*, DA PAM 27-161-2 at 224-35; NORMAN E. TUTOROW, *WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS: AN ANNOTATED BIBLIOGRAPHY AND SOURCE BOOK* 4-8 (1986).
- G. Geneva Conventions. Marked the codification - beginning in 1949 when the conventions were opened for signature - of specific international rules pertaining to the trial and punishment of those committing "grave breaches" of the conventions. *See, e.g.*, PICTET at 357-60.
- H. Post-World War II Insurgencies.

Because internal strife and civil wars are still largely outside the parameters of war crimes and the grave breaches provisions of the Geneva conventions, no attempts have been made to bring to justice those committing atrocities in Cambodia, Uganda, and northern Iraq (among other places).

- I. U.S. soldiers committing war crimes in Vietnam were tried by U.S. courts-martial under analogous provisions of the UCMJ., *see, e.g.*, MAJOR GENERAL GEORGE S. PRUGH, *LAW AT WAR: VIETNAM 1964-1973* 76-77 (1975); W. Hays Parks, *Crimes in Hostilities*, Marine Corps Gazette, Aug. 1976, at 16-22.
- J. Panama. In a much-publicized case arising in the 82d Airborne Division, a First Sergeant charged, under UCMJ. art. 118, with murdering a Panamanian prisoner, was acquitted by a general court-martial. *See United States v. Bryan*, Unnumbered Record of Trial (Hdqtrs, Fort Bragg 31 Aug. 1990) [on file with the Office of the SJA, 82d Airborne Div.].
- K. The Persian Gulf War. Although the United Nations Security Council had invoked the threat of prosecutions of Iraqi violators of international humanitarian law, the post-conflict resolutions were silent on criminal responsibility. *See, e.g.*, S.C. Res. 692, U.N. SCOR, 2987th mtg., U.N. Doc. S/RES/692 (1991), *reprinted in* 30 I.L.M. 864 (1991); *see also* Theodore Meron, *The Case for War Crimes Trials in Yugoslavia*, Foreign Affairs, Summer 1993, at 125.
- L. The Former Yugoslavia. On 22 February 1993, the Security Council decided to establish the first international war crimes tribunal since the Nuremberg and Far East trials after World War II. S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993). On 25 May 1993, the Council unanimously approved a detailed report by the Secretary General recommending tribunal rules of procedure, organization, investigative proceedings and other matters. S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993).
- M. Rwanda. On Nov. 8, 1994 the UNSC adopted a Statute creating the International Criminal Tribunal for Rwanda. S.C. Res. 955, U.N. Doc. S/RES/955 (1994). Art. 14 of the Statute for Rwanda provides that the rules of procedure and evidence adopted for the Former Yugoslavia shall apply here, with changes as deemed necessary. This is deemed an internal armed conflict as opposed to the International armed conflict in the Former Yugoslavia.

XXIX.WHAT IS A WAR CRIME?

- A. Definition. The lack of a clear definition for this word stems from the fact that both "war" and "crime" themselves have multiple definitions. When used as a generic term, "war crime" seems to mean any violation of international law that is subject to punishment. When used more technically, it seems to be limited to violations of recognized rules regarding the conduct of warfare.
1. "In contradistinction to hostile acts of soldiers by which the latter do not lose their privilege of being treated as lawful members of armed forces, war crimes are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders." L. OPPENHEIM, 2 INTERNATIONAL LAW 251 (7th ed., H. Lauterpacht, 1955); *accord* TELFORD TAYLOR, NUREMBERG AND VIETNAM 19-20 (1970).
 2. "Crimes committed by countries in violation of the international laws governing wars. At Nuremberg after World War II, crimes committed by the Nazis were so tried." BLACK'S LAW DICTIONARY 1583 (6th ed. 1990); *cf.* FM 27-10, & 498 (defining a broader category of "crimes under international law" of which "war crimes" form only a subset and emphasizing personal responsibility of individuals rather than responsibility of states).
 3. "The term 'war crime' is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime." FM 27-10 at & 499.
- B. The Nuremberg Categories. The Charter of the International Military Tribunal defined the following crimes as falling within the Tribunal's jurisdiction:
1. Crimes Against Peace. Planning, preparation, initiation, or waging of a declared or undeclared war of aggression, or war otherwise in violation of international treaties, agreements, or assurances. This was a charge intended to be leveled against high level policy planners, not generally at ground commanders.
 2. War Crimes. The traditional violations of the laws or customs of war..

3. Crimes Against Humanity. A collective category of major felonious crimes committed against any (internal or alien) civilian population before or during an armed conflict.

See Charter of the International Military Tribunal, art. 6, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, reprinted in I TRIALS OF WAR CRIMINALS IX-XVI. See generally OPPENHEIM at ¶ 257 (noting that only 1 accused was found guilty solely of crimes against peace and 2 guilty solely of crimes against humanity).

- C. Grave Breaches Versus Simple Breaches of the Law of War. The codification in 1949 of crimes involving certain serious conduct gave rise to a distinction between those crimes and acts violative of other customs or rules of war.

1. Grave Breaches. Serious felonies. Examples include:

- a. Willful killing;
- b. Torture or inhumane treatment;
- c. Biological experiments;
- d. Willfully causing great suffering or serious injury to body or health;
- e. Taking of hostages;
- f. Extensive destruction of property not justified by military necessity;
- g. Compelling a prisoner of war to serve in the armed forces of his enemy;
- h. Willfully depriving a prisoner of war of his rights to a fair and regular trial. *See GWS, art. 50; GWS Sea, art. 51; GPW, art. 130; GC, art. 147*

2. Simple Breaches. Examples include
- a. Making use of poisoned or otherwise forbidden arms or ammunition;
 - b. Treacherous request for quarter;
 - c. Maltreatment of dead bodies;
 - d. Firing on localities which are undefended and without military significance;
 - e. Abuse of or firing on the flag of truce;
 - f. Misuse of the Red Cross emblem;
 - g. Use of civilian clothing by troops to conceal their military character during battle;
 - h. Improper use of privileged buildings for military purposes;
 - i. Poisoning of wells or streams;
 - j. Pillage or purposeless destruction;
 - k. Compelling prisoners of war to perform prohibited labor;
 - l. Killing without trial spies or other persons who have committed hostile acts;
 - m. Compelling civilians to perform prohibited labor;

- n. Violation of surrender terms. *See* FM 27-10, & 504.
3. The Implications of Protocol I. *Cf.* DA Pam 27-1-1, Protocol I, arts. 11(4), 85.
- D. Genocide. In 1948, the U.N. General Assembly defined this crime to consist of killing and other acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group. *See* Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 11, 1948, art. 2, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). U.S. ratification was given advice and consent by Senate in the Genocide Convention Implementation (Proxmire) Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (codified at 18 U.S.C. § 1091).
 - E. Common Article 3. GC I, Article 3. The 1994 U.N. Res. 955 creating the Statute for Rwanda and determining its jurisdiction cited the fact that this is an internal armed conflict and therefore, violations of Common Article 3 of the Geneva Conventions, as more fully elaborated in Article 4 of the Additional Protocol II, are applicable. Common Article 3 sets out a minimum guarantee of humane treatment to be accorded to persons taking no part in hostilities. Report of the Secretary-General Pursuant to Para. 5 of Security Council Res. 955,(1994), U.N. Doc S/1995/134 (13 Feb. 1995).
 - F. The International Criminal Tribunal Categories.
 1. International Criminal Tribunal for the Former Yugoslavia. Has been given jurisdiction to prosecute violations of the laws or customs of war (war crimes), grave breaches, genocide and crimes against humanity as defined by the Charter.
 2. International Criminal Tribunal for Rwanda. Has been given jurisdiction to prosecute genocide, crimes against humanity, and common article 3, Protocol II, Art. 4 violations, as defined by that Charter.

- G. Conspiracy, Incitement, Attempts, and Complicity. International law allows for punishment of these forms of crime. *See* GPW, art. 129 (subjecting to penal sanctions "persons alleged to have committed, or to have ordered to be committed" serious war crimes) (emphasis added); Allied Control Council Law No. 10, art. II, & 2, Dec. 20, 1945, *reprinted in* I Trials of War Criminals at XVI; U.N. DOC. S/RES/827 (1993) Art. 7; U.N. DOC S/RES/955, Art. 6; FM 27-10, ¶ 500.

XXX. RESPONSIBILITY OF COMMANDERS AND OTHER SUPERIORS FOR THE ACTS OF SUBORDINATES.

- A. The nature of military organizations is such that complicity may be present but difficult to demonstrate. A doctrine of command responsibility has emerged, partially mitigating these practical difficulties of prosecution.
- B. The *Yamashita* precedent. A Japanese general was convicted for "permitting" troops under his command to commit specified atrocities of an extensive and widespread nature.
1. The Prosecutor's "Should Have Known" Argument. The atrocities were "so notorious and so flagrant and so enormous . . . that they must have been known to the Accused if he were making any effort whatever to meet the responsibilities of his command or his position" *In Re Yamashita*, RG 153, at 100 (U.S. Army Forces West. Pac., Military Commission, 29 Oct. 1945) (argument of Major Robert Kerr) (on file with U.S. Army, Records of the Judge Advocate General, Washington National Records Center), *quoted in* RICHARD L. LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* (1982).
 2. Held. "[T]he law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and . . . he may be charged with personal responsibility for his failure to take such measures when violations result." *In Re Yamashita*, 327 U.S. 1, 15 (1945).

3. Dissent. "Nowhere was it alleged that the petitioner personally committed any of the atrocities, or that he ordered their commission, or that he had any knowledge of the commission thereof by members of his command." 327 U.S. at 26, 34 (Murphy, J., dissenting).

C. A Step Back From *Yamashita*?

1. *Cf.* The Hostages Case, XI TRIALS OF WAR CRIMINALS at 1230, 1260 (1948) (judgment against Field Marshal Wilhelm List) ("An Army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters . . . It would strain credulity of the Tribunal to believe that a high ranking commander would permit himself to get out of touch with current happenings in the area of his command during wartime.").
2. *Cf.* The High Command Case, XI *Trials of War Criminals* at 462, 542 (1948) (judgment against Field Marshal Wilhelm Von Leeb and others) ("There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part.").

D. Army Policy. "The commander is responsible if he ordered the commission of the crime, has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof." FM 27-10, 501; *see also* TC 27-10-3 at 19-21.

E. The "Medina" Standard. "You will observe that . . . legal requirements placed upon a commander require

1. actual knowledge plus
2. a wrongful failure to act." *United States v. Medina*, Unnumbered Record of Trial (Hdqtrs Fort Benning, September 1971), *quoted in* LAEL, at 130 (excerpting portion of instructions to panel from military judge).

F. Protocol I, Article 86., *Cf.* DA PAM 27-1-1. The fact that a subordinate may breach the Conventions or this Protocol does not absolve his superiors from penal or disciplinary responsibility.

G. The International Criminal Tribunals for the Former Yugoslavia & Rwanda.

1. "Art. 7: Individual Criminal Responsibility: The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." Report of the Secretary-General, see reference 19; also adopted in Statute for Rwanda, reference 21, Art 6(3).
2. Indictments against Radovan Karadzic (as founding member and President of Serbian Democratic Party) & Gen. Ratko Mladic (Commander of JNA Bosnian Serb Army) highest ranking Bosnian-Serb military leaders.
3. Indictments against Theoneste Bagosora (assumed official and '*de facto*' control of military and political affairs in Rwanda) and Jean Paul Akayesu (bourgmestre (mayor), responsible for executive functions and maintenance of public order within his commune) high ranking civilian officials in the Rwandan national and local government, respectively.

H. CPT Lawrence P. Rockwood (HHC, 10th Mtn. Div., Ft. Drum, New York, 1995). Pending Appeal-Army 95-00872. CPT Rockwood used this theory of Command Responsibility, without success, to justify his failure to obey orders.

XXXI.U.S. OBLIGATIONS, IMPLEMENTING LEGISLATION, AND POLICIES.

- A. The United States shoulders the following obligations as a matter of treaty-made law, and to a not clearly defined extent, customary international law:
1. To enact laws to ensure effective punishment of those committing grave breaches. *See* GWS, art. 49, cl. 1; GWS Sea, art. 50, cl. 1; GPW, art. 129, cl. 1; GC, art. 146, cl. 1.

2. To search out and then either prosecute or extradite those who have committed grave breaches. *See* GWS, art. 49, cl. 2; GWS Sea, art. 50, cl. 2; GPW, art. 129, cl. 2; GC, art. 146, cl. 2.
 - a. The United States has corresponding jurisdiction, as a matter of international law, to try and punish all war criminals that fall into its hands, whether or not the offenses have been committed against Americans. *See* Oppenheim at ¶ 257c. In this sense, there is universality of war crimes jurisdiction among states. *See* FM 27-10, 507.
 - b. Universality of jurisdiction over war criminals was part of customary international law well before the 1949 Geneva Conventions. *See* Israel v. Eichman, Israel District Court of Jerusalem, Dec. 12, 1961, *reprinted in* II LEON FREIDMAN, THE LAW OF WAR: A DOCUMENTARY HISTORY 1627, 1631-35 (1972); *see also* William B. Cowles, *Universality of Jurisdiction over War Crimes*, 33 Calif. L. Rev. 177-218 (1945).
 - c. Obligation was limited by the Dayton Peace Accord for Former Yugoslavia for IFOR. "IFOR personnel will have the authority to detain any persons who may be indicted for war crimes, but they will not try to track them down." Operation Joint Endeavor Fact Sheet, p.2, No. 0004-B, (Dec. 7, 1995).
3. To "take measures necessary for the suppression" of simple breaches. *See* GWS, art. 49, cl. 3, GWS Sea, art. 50, cl. 3; GPW, art. 129, cl. 3; GC, art. 146, cl. 3
4. To provide accused persons "safeguards of proper trial and defense." *See* GWS, art. 49, cl. 4, GWS Sea, art. 50, cl. 4; GPW, arts. 105-08, 129, cl. 4; GC, art. 146, cl. 4.
5. To pay compensation--"if the case demands"--for the grave breaches committed by members of its armed forces. *See* H. IV, art. 3.; GWS, art. 51; GWS Sea, art. 52; GPW, art. 131; GC, art. 148.

B. U.S. laws and policies operate to discharge these obligations.

1. As discussed below, Congress has provided general courts-martial and military commissions with requisite authority to try and punish war criminals effectively. UCMJ, arts. 18, 21.
 - a. Because the international law of war is part of the law of the land, *see* U.S. Const., art. VI, these courts can directly apply international law in trials, outside the United States, of enemy personnel charged with war crimes. No recourse need be made to substantive criminal statutes of the United States. *See* FM 27-10, & 505e.
 - b. Violations of the law of war committed within the United States by those not subject to the punitive articles of the UCMJ will usually constitute violations of federal or state criminal laws. They should be prosecuted under these municipal laws. *See* FM 27-10, & 507b.
 - c. Violations of the law of war which constitute **war crimes** are now subject to prosecution under federal law, if the perpetrator or the victim is a national of the U.S. or a member of the armed forces of the U.S., if such activity occurs within or outside the U.S. 18 USC 2441.

War Crimes are defined as grave breaches, Articles 23, 25, 27 & 28 of Hague Convention IV, Common Article 3, and violations of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps & Other Devices. (War Crimes Act of 1997)
 - d. Violations of the law of war committed by persons subject to the UCMJ will usually constitute violations of the UCMJ and, if so, will be prosecuted thereunder. *See* FM 27-10, & 507b.

2. Executive branch policies require the prompt reporting and investigation of alleged war crimes as well as appropriate disposition of resulting cases under the UCMJ. DoD Dir. 5100.77 at && C.3. & E2e.(2)-(3); FM 27-10, & 507.
 - a. The U.S. Army has designated its Criminal Investigation Command as an investigative asset. *See* DEP'T OF ARMY, REGULATION 195-2, CRIMINAL INVESTIGATION ACTIVITIES, at & 3-3(7) (30 Oct. 1985).
 - b. The Army has designated Reserve Component International/Operational Law Teams to investigate and report on the law of war. *See* DEP'T OF ARMY, REGULATION 27-1, JUDGE ADVOCATE LEGAL SERVICE & 11-6b(1) (3 Feb. 1995).
 - c. If involved in a prolonged armed conflict, a directive at the level of the unified combatant command or lower will likely dictate a specific investigative procedure.
 - (1) *See, e.g.,* Headquarters, Military Assistance Command, Vietnam, Directive 20-4, Inspections and Investigations of War Crimes (18 May 1968), *reprinted in* MAJOR GENERAL GEORGE S. PRUGH, LAW AT WAR: VIETNAM 1964-1973 136-39 (1975);
 - (2) *See also* Headquarters, U.S. ARMED FORCES CENTRAL COMMAND, REGULATION NUMBER 27-25, REPORTING AND DOCUMENTATION OF ALLEGED WAR CRIMES (9 Feb. 1991) (Persian Gulf conflict).
3. The foregoing investigative policies and procedures, combined with the law of war training program in place in the U.S. armed forces, discharge the obligation to suppress breaches. *See, e.g.,* DEP'T OF ARMY, REGULATION 350-41: TRAINING IN UNITS, Ch. 14 (19 Mar. 1993).

U.S. policy places significant responsibility for the prevention of war crimes with the individual soldier, who is expected to recognize patently illegal orders. See

FM 27-10, & 509; TC 27-10-3, & 14-16; DEP'T OF ARMY, STP 21-1-SMCT, SOLDIER'S MANUAL OF COMMON TASKS, Skill Level 1, at 727-28 (1 Oct. 1990).

4. Official inquiries yield recommendations on how to avoid similar crimes in the future. The inquiry in the aftermath of the My Lai incident associated the following factors with an increased potential for war crimes in a unit:
 - a. High friendly losses.
 - b. High turn-over rate in the chain of command.
 - c. A tendency to dehumanize the enemy by the use of derogatory names or epithets.
 - d. Poorly trained or ill-disciplined troops.
 - e. Inexperienced troops.
 - f. No clearly defined enemy.
 - g. Unclear orders.
 - h. "Body-count" syndrome. *See, e.g.,* LIEUTENANT GENERAL W.R. PEERS, *THE MY LAI INQUIRY* 229-237 (1979). By inculcating the lessons of such incidents through instruction, officers participate in discharging the U.S. obligation to suppress both grave and simple breaches.
5. Using authority derived from statute, *see* UCMJ, art. 36, the President prescribes rules governing pretrial, trial, and post-trial procedures that comply with GPW, arts. 105-08.

XXXII.PROSECUTION OF WAR CRIMES.

A. Jurisdictional Bases.

1. International Tribunal. Ad hoc decision as to whether to create one or not.
2. Constitutional.
 - a. Congress has the power to define and punish offenses against the Law of Nations. U.S. Const., art. I, § 8(10).
 - b. Congress has the power to "provide for the common defense." Art. I, § 8(1).
 - c. Congress has the power to provide and maintain a Navy, Art. I, § 8(13), and to raise and support Armies. Art. I, § 8(12).
 - d. Congress is given authority to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." Art. I, § 8(11).
 - e. Congress has the authority "To make rules for the Government and Regulation of the land and naval Forces." Art. I, § 8(14).
 - f. Congress has the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8 (18).
 - g. The President is the "executive Power." Art. II, § 1(1), who has the duty to "take Care that the Laws be faithfully executed." Art. II, § 3.

- h. The President is the Commander in Chief of the Army and Navy, Art. II, § 2(1), and has the power to appoint and commission officers of the United States. Art. II, § 3(1)
- i. Treaties are the supreme law of the land. Art. VI, cl. 2. *See generally Ex Parte Quirin*, 317 U.S. 1, 26 (1942) (reviewing constitutional underpinnings for military commissions).

3. Statutory

- a. UCMJ Art. 18. Authorizes the military to try by general court-martial anyone subject to trial for violations of the law of war.
- b. UCMJ Art. 21. Authorizes the use of military commissions, tribunals, or provost courts to try individuals for violations of the law of war.
- c. 18 USC 2441. Authorizes prosecution of anyone for war crimes committed inside or outside the U.S., if the person committing the crime or the victim of the crime is a member of the Armed Forces of the U.S. or a national of the U.S., as defined in the Immigration and Nationality Act.

(1) War Crime means conduct

- (a) Defined as a grave breach by Geneva Conventions or Protocols to which U.S. is a party;
- (b) Which violates Articles 23, 25, 27 & 28 of Hague Convention IV;
- (c) Which is violation of Common Article 3 of the Geneva Conventions, or any Protocol to such convention to which U.S. is party and which deals with non-international armed conflict;

- (d) Which is contrary to provisions of Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps & Other Devices (Protocol II as amended on 3 May 1996) when U.S. is party to the Protocol, and in which the person has willfully killed or seriously injured a civilian(s).

B. The Choice of Forum

1. International Tribunals.

- a. Because no permanent international court for the trial of war crimes exists, this category of forum requires ad hoc creation by special international agreement, as occurred in the creation of the International Military Tribunal at Nuremberg by the London Agreement of 8 August 1945, and as occurred in the provision for subsequent proceedings at Nuremberg by Control Council Law No. 10 of 20 December 1945. *See generally* 27-161-2 at 224- 33.
- b. International Tribunals for the Former Yugoslavia and Rwanda were established by UNSC Resolutions. These resolutions result from power given to the UNSC by Art. 41 of the U.N. Charter. The resolutions of the UNSC are binding on all states who are members of the UN. UN Charter, Articles 48 & 49.

2. General Courts-Martial.

- a. Punishment may be any punishment permitted by the law of war. UCMJ, art. 18.
- b. For a capital case, the court must consist of a military judge and not less than five members. UCMJ, arts 16, 18.
- c. All rights and procedures provided under the Rules for Courts-Martial, the Military Rules of Evidence, and the Punitive Articles shall apply. *See* MCM, pt. I, & 2.b.(1).

3. Military Commissions.

- a. Have concurrent jurisdiction with general courts-martial. UCMJ, art. 21.
- b. Historically used not only for war crimes trials but also for violations of Occupation Ordinances and orders of Theatre Commanders. Authority Under International Law. *See, e.g.*, Oppenheim at ¶ 172 ("But an occupant may, where necessary, set up military courts instead of the ordinary courts . . ."). *See also* FM 27-10, & 373 (noting that in situations dictating the suspension of the ordinary courts of justice of the occupied territory, "the occupant may establish courts of its own and make this measure known to the inhabitants.").
 - (1) Authority Under U.S. Municipal Law. "[M]ilitary commissions have jurisdiction] with respect to offenders or offenses that by . . . the law of war may be tried by military commissions, provost courts, or other military tribunals." UCMJ, art. 21.
 - (2) Have withstood statutory, treaty-based, and constitutional challenges before the Supreme Court. *See Ex Parte Quirin*, 317 U.S. 1 (1942); *In Re Yamashita*, 327 U.S. 1 (1945).
 - (3) Absent action by the President pursuant to Article 36, UCMJ, to set rules and procedures, and in the absence of applicable international law, military commissions "shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial." MCM, pt. I, & 2.(b)(2).

- (4) In theory, could provide very limited evidentiary and procedural formality, *see, e.g., Yamashita*, 327 U.S. at 18, and a very streamlined appeal process. *Cf.* *Eisentrager v. Forrestal*, 174 F.2d 961 (1949) (finding that German nationals, confined in custody of the U.S. Army in Germany following conviction by military commission of having engaged in military activity against the United States after surrender of Germany, had substantive right to writ of *habeas corpus* to test legality of their detention).
- (5) But treaty obligations provide a floor of procedural rights, at least as to offenses by prisoners of war, that precludes military commissions in this category of cases.
 - (a) *See* GPW, art. 102 ("A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedures as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed."); GPW, art. 85 ("Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention").
 - (a) *Cf. Yamashita*, 327 U.S. at 22 (construing predecessor to art. 102 as applying only to judicial proceedings directed against a prisoner of war for offenses committed while a prisoner of war and not to precapture offenses).

(b) *See also* HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 321 n. 29, 335 n. 98, 383 (1976); IV PICTET at 413-14; 2 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 389-90; JOHN N. MOORE, ET. AL., NATIONAL SECURITY LAW 373 (1990).

4. Selection Considerations Connected to Status of the Accused.

- a. U.S. soldiers. Tried at court-martial under appropriate provisions of the UCMJ or if separated from the military, possibly 18 USCA 2441(1997). *See above*.
- b. Civilians Accompanying the U.S. Forces.
 - (1) If a declared war, then same as for U.S. soldiers. *See* UCMJ, art. 2(a)(10). If an undeclared war then see *United States v. Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).
 - (2) A bill is pending in the Senate to amend title 18 USC to set forth civil jurisdiction of the US for crimes committed by persons accompanying or employed by the armed forces, in “contingency operations,” outside of the US.
- c. Enemy Prisoners of War and Civilians.
 - (1) For post-capture offenses, try by general courts-martial if civilian. If a POW, try by general court-martial or under appropriate level of authority under the UCMJ. *See* UCMJ, art. 2(a)(9).

- (2) For pre-capture offenses, try civilians by either military commission or general courts-martial. Try POW by general court-martial or under UCMJ level of authority appropriate for a U.S. soldier similarly situated.
- 5. Potential Defenses. *See generally* R.C.M. 916; DA PAM. 27-161-2 at 245-251.
 - a. Military Necessity. Action was demanded by military circumstances and was done to prevent a greater harm; does not allow the taking of human life.
 - b. Mistake of Fact. Traditional mistake of fact defense.
 - c. Duress. Traditional duress defense; does not allow the taking of human life. *See* Prosecutor v. Erdemovic, IT-96-22-A, In the Appellate Court, Judgment, 7 October 1997.
 - d. Reprisals. Otherwise illegal act done in response to a prior illegal act by the enemy. Requirements must be met, and it must be properly authorized. *See* FM 27-10, & 497.
 - e. Alibi. The Prosecutor v. Dusan Tadic, IT-1-94-T, Judgement, 7 May 1997.
 - f. Superior Orders. *See generally* R.C.M. 916(d); FM 27-10, & 509; DEP'T OF NAVY, NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.7, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, at & 6.1.4 (October 1995).
 - (1) This is a very limited defense:
 - (2) The accused did not know the order was unlawful; and
 - (3) A person of ordinary sense and understanding would not have known the order was unlawful.

- g. Consideration for the trier of fact when applying the defense of superior orders.
 - (1) Obedience to lawful orders is the duty of every member of the military.
 - (2) Subordinates cannot be expected to scrupulously weigh the legal merits of orders received in combat.
 - (3) Certain laws of warfare may be controversial.
 - h. Prohibited Defense in the International Criminal Tribunals.
Individual Criminal Responsibility The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the Int'l Tribunal determines that justice so requires." References 19 and 21.
6. Penal Sanctions. The punishment for violations of the law of war must be proportionate to the seriousness of the offense. The death penalty may be imposed for grave breaches of the Geneva Conventions. *See* FM 27-10, & 508.
7. Charging Considerations. *See* generally FM 27-10, & 507b; R.C.M. 307(c)(2).

XXXIII.CONCLUSION

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PRISONERS OF WAR AND DETAINEES

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REFERENCES

1. Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (GPW), *reprinted in* DEP'T OF THE ARMY PAMPHLET 27-1, TREATIES GOVERNING LAND WARFARE (1956) [hereinafter DA Pam 27-1].
2. Hague Convention Number IV Respecting the Laws and Customs of War on Land, October 18, 1907, *reprinted in* DA Pam 27-1.
3. Protocols Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflict, *reprinted in* DEP'T OF THE ARMY PAMPHLET 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1979).
4. DEP'T OF DEFENSE DIRECTIVE 5100.77, DoD LAW OF WAR PROGRAM (July 10, 1979).
5. DEP'T OF DEFENSE DIRECTIVE 2310.1, DoD PROGRAM FOR ENEMY PRISONERS OF WAR AND OTHER DETAINEES (August 18, 1994).
6. CHAIRMAN, JOINT CHIEFS OF STAFF INSTRUCTION 3290.01, PROGRAM FOR ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES, AND OTHER DETAINED PERSONNEL (20 Mar. 1996).
7. III INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY TO THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Pictet ed. 1960)[hereinafter Pictet].
8. DEP'T OF THE ARMY FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (1956) w/ C1 (1976)[hereinafter FM 27-10].
9. DEP'T OF THE ARMY FIELD MANUAL 19-40, ENEMY PRISONERS OF WAR, CIVILIAN INTERNEES, AND DETAINED PERSONS (1976)[hereinafter FM 19-40].
10. DEP'T OF ARMY REG. 190-8, ENEMY PRISONERS OF WAR ADMINISTRATION, EMPLOYMENT, AND COMPENSATION (2 Dec. 1985)[hereinafter AR 190-8].
11. DEP'T OF THE ARMY PAMPHLET 27-161-2, INTERNATIONAL LAW, VOLUME II (1962).
12. JA 442, OPLAW HANDBOOK, Chapter 18 (1997).
13. Howard S. Levie, 59 INTERNATIONAL LAW STUDIES, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT, (1977)[hereinafter Levie].
14. Howard S. Levie, 60 INTERNATIONAL LAW STUDIES, DOCUMENTS ON PRISONERS OF WAR (1979)[hereinafter Levie, DOCUMENTS ON PRISONERS OF WAR].

XXXIV.HISTORY OF PRISONERS OF WAR.⁴

- A. No internationally recognized rights to certain protections until 1907. Your captive was yours to kill, sell, or put to work. No one was as helpless as an enemy prisoner of war (EPW).⁵

⁴ See WILLIAM FLORY, PRISONERS OF WAR: A STUDY IN THE DEVELOPMENT OF INTERNATIONAL LAW (1942), for a more detailed account of prisoner of war treatment through antiquity.

⁵ Probably the most famous medieval prisoner of war was England's Richard I of Robin Hood fame. King Richard's ship sank in the Adriatic Sea during his return from the Third Crusade in 1192. While crossing Europe in disguise, he was captured by Leopold, Duke of Austria. Leopold and his ally the Holy Roman Emperor, Henry VI, entered into a treaty with Richard on St. Valentine's Day, 1193, whereby England would pay them £100,000 in exchange for their king. This amount then equaled England's revenues for five years. The sum was ultimately paid under the watchful eye of Richard's mother, Eleanor of Aquitaine, and he returned to English soil on March 13, 1194. See M. Foster Farley, *Prisoners for Profit: Medieval intrigue quite often focused upon hopes of rich ransom*, MIL. HISTORY (Apr. 1989), at 12.

- B. First agreement to establish prisoner of war (POW) treatment guidelines was probably in the 1785 Treaty of Friendship between the U.S. and Prussia.⁶
- C. Article 60, *Instructions For the Government of Armies of the U.S. in the Field*, General Orders 100 (1863), commonly called the Lieber Code, cited the traditional view about POWs. It provides: "a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it impossible to cumber himself with prisoners."⁷
- D. Some modern day authors still support this view.
- To [kill prisoners of war] is certainly ugly, but common sense would seem on occasion to require that it be done. Only the armchair combatant legislating in times of peace can seriously expect a commander to endanger the lives of his own men to save those of enemies who until quite recently were doing their best to kill him.*⁸
- THEY ARE WRONG!⁹**
- E. Captured enemy have traditionally suffered great horrors as POWs. Most Americans associate POW maltreatment during the Civil War with the Confederate camp at Andersonville. However, maltreatment was equally brutal at Union camps. In fact, in the Civil War 26,486 Southerners and 22,576 Northerners died in POW camps.¹⁰

Richard's confinement by Leopold did seem to ingrain some compassion for future prisoners of war he captured. Richard captured 15 French knights in 1198. He ordered all the knights blinded but one. Richard spared this knight one eye so he could lead his companions back to the French army. This was considered an act of clemency at the time. MAJOR PAT REID, PRISONER OF WAR (1984).

⁶ Accord, Levie, at 5. See Levie, DOCUMENTS ON PRISONERS OF WAR, at 8, for the text of this treaty.

⁷ See Levie, DOCUMENTS ON PRISONERS OF WAR, at 39. For a summary of who Doctor Francis Lieber was and the evolution of the Lieber Code, see George B. Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in the Field*, 1 AM. J. INT'L L. 13 (1907).

⁸ MAJOR PAT REID, PRISONER OF WAR (1984)(Major Reid was a British POW during W.W.II).

⁹ For an analysis of a nation's obligation to prosecute or hand over its own soldiers who murder prisoners of war, see Scott R. Morris, *Killing Egyptian Prisoners of War: Does the Phrase 'Lest we forget' Apply to Israeli War Criminals?*, 29 VAND. J. TRANS. L. 903 (1996).

¹⁰ Over one-half of the Northern P.O.W.s died at Andersonville. See Lewis Lask and James Smith, *'Hell and the Devil': Andersonville and the Trial of Captain Henry Wirz, C.S.A., 1865*, 68 MIL. L. REV. 77 (1975). See also U.S. Sanitary Commission, *Narrative of Privations and Sufferings of United States Officers and Soldiers while Prisoners of War in the Hands of the Rebel Authorities*, S. RPT. NO. 68, 40th CONG., 3RD SESS. (1864), for a description of conditions suffered by POWs during the civil war. Flory, *supra*, at 19, n. 60 also cites the Confederate States of America, *Report of the Joint Select Committee Appointed to Investigate the Condition and Treatment of Prisoners of War* (1865).

XXXV.TERMS ARE IMPORTANT!

- A. Prisoners of WAR (POWs): A detained person as defined in Articles 4 & 5, GPW (FM 27-10, ¶61).
- B. Civilian Internees: A civilian who is interned during armed conflict or occupation for security reasons or for protection or because he has committed an offense against the detaining power (JCS Pub 1).¹¹
- C. Retained personnel: Medical and religious personnel retained by the Detaining power with a view of assisting POWs (Art. 33, GPW).
- D. Detainees: A term used to refer to any person captured or otherwise detained by an armed force (JCS Pub 1). It includes those person held during operations other than war (DoD Dir 2310.1).
- E. Refugees: Persons who by reason of real or imagined danger have left home to seek safety elsewhere. (JCS Pub 1). See Art. 44, GCC and 1951 UN Convention Relating to the Status of Refugees.¹²
- F. Dislocated civilian: A generic term that includes a refugee, a displaced person, a stateless person, an evacuee, or a war victim.¹³
- G. In sum, **always use the term detainee**; it is the broadest term without legal status connotations.

XXXVI.GPW IS PART OF THE SUPREME LAW OF THE LAND (ARTICLE VI, CONSTITUTION OF THE UNITED STATES). THUS, ITS ARTICLES APPLY UNLESS THEY ARE INCONSISTENT WITH THE CONSTITUTION ITSELF.

- A. DA is Executive Agent for all EPW Matters. DoD Dir. 2310.1 provides:
U.S. Military Services shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions.¹⁴

¹¹ DEP'T OF DEF., JOINT CHIEFS OF STAFF PUBLICATION 1 (1 June 1987). See also Section IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (reprinted in DA PAM. 27-1)[hereinafter GCC] and the Protections of Civilians in Armed Conflict chapter of this text.

¹² 189 U.N.T.S. 137.

¹³ See DEP'T OF THE ARMY, FIELD MANUAL 41-10, CIVIL AFFAIRS (11 January 1993).

- B. Every JA and soldier must understand that **STATUS** is a matter of law. While the United States **TREATS** all persons initially detained consistent with the provisions of the GPW, this is only a policy.¹⁵
- C. The Phenomenon of Detainees. In operations other than war, the status of a person temporarily detained is frequently at issue. Therefore, our policy is to initially provide the greatest protections this person could receive until our government determines their legal status.

XXXVII.STATUS AS A MATTER OF LAW.

- A. **In order to achieve the status of a prisoner of war, you have to be the right kind of person in the right kind of place.**
- B. The question of status is enormously important. There are two primary benefits of EPW status. First, you receive immunity for warlike acts (Your acts of killing and breaking things are not criminal). Second, you are entitled to the rights and protections under the GPW. One of those rights is the prisoner is no longer a lawful target.
 - 1. Protections.
 - a. Humane Treatment.
 - b. No medical experiments.
 - c. Protect from violence, intimidation, insults, and public curiosity.¹⁶
 - d. Equality of treatment.

¹⁴ Note, the DoD Directive refers to the Geneva Conventions, not simply the one relating to EPWs. This supports the use of the GCC when more appropriate than the GPW: certain detainees. For a thorough analysis of the rights afforded civilians along the operational continuum, *see* Richard M. Whitaker, *Civilian Protection Law in Military Operations: An Essay*, ARMY LAW. (Nov. 1996), at 3.

¹⁵ *See also* Art. 4 & 27, GCC.

¹⁶ Trial of Lieutenant General Kurt Maelzer, Case No. 63, *reprinted in* UNITED NATIONS WAR CRIMES COMMISSION, XI LAW REPORTS OF TRIALS OF WAR CRIMINALS 53 (1949)(parading of American prisoners of war through the streets of Rome). *See* Gordon Risius and Michael A. Meyer, *The protection of prisoners of war against insults and public curiosity*, INT'L REV. RED CROSS, No. 295, (July/Aug. 1993), at 288. This article focuses on the issue of photographing prisoners of war.

- e. Free maintenance and medical care.
 - f. Respect for person and honor (female POWs).
 - g. No Reprisals.
 - h. No Renunciation of Rights or Status (Art. 7, GPW).
- 2. The Concept of the Protecting Power.¹⁷
 - 3. Immunities for warlike acts, but not for pre-capture criminal offenses (i.e., Noriega).
- C. Conversely, there are profound consequences of lacking status after committing a hostile act. First, the person receives no immunity for his actions and is subject to the domestic or military law of one's adversary. Second, at best, he is only entitled to minimal protections under the Civilians Convention.¹⁸

XXXVIII. THE RIGHT KIND OF PLACE

- A. Common Article 2, GPW: The "Conventions shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties. . . ." (emphasis added).

¹⁷ See Levie, at 262.

¹⁸ These protections would include those commonly associated with the minimum rights under common Article 3 and Protocol II. Their rights would include:

- a. trial before an impartial court;
- b. a presumption of innocence;
- c. prohibition on compelling the prisoner to testify against themselves; and,
- d. treatment the same as the local civilian population.

For a more detailed analysis of these protections, see Chapter 13, *Civilian Protection Law*, OPLAW HANDBOOK (1997).

1. Commonly known examples of common Article 2 conflicts include W.W.II, Korea,¹⁹ Vietnam,²⁰ Falklands,²¹ Grenada,²² Panama,²³ and the Persian Gulf.²⁴
2. Whether or not a conflict rises to the level of common Article 2 is a question of fact.²⁵ Factors one should consider are:

¹⁹ While few people argue whether or not the Korean War was a common Article 2 conflict, there was a question of whether the 1949 Geneva Conventions would apply. The United States did not ratify the Conventions until 1955. However, by July 1950, the United States, South Korea, and North Korea all agreed to be bound its terms. *See The Geneva Conventions in the Korean Hostilities*, DEP'T OF STATE BULLETIN, vol. 33, at 69 - 73 (1955). Unfortunately, in practice, North Korea routinely abused and killed POWs in violation of the agreement and the terms of the 1949 Conventions. For a discussion of mistreatment prisoners of war have faced in general at the hands of communist captives, *see* SEN. SUBCOMM. TO INVESTIGATE THE ADMIN. OF THE INTERNAL SECURITY ACT AND OTHER INTERNAL SECURITY LAWS OF THE COMM. ON THE JUDICIARY, 92ND CONG., 2D SESS., COMMUNIST TREATMENT OF PRISONERS OF WAR: A HISTORICAL SURVEY (Comm. Print 1972).

²⁰ *See* THE VIETNAM WAR AND INTERNATIONAL LAW (R. Falk, ed. 1968), and LAW AND RESPONSIBILITY IN WARFARE: THE VIETNAM EXPERIENCE (P. Trooboff, ed. 1975).

²¹ *See* James F. Gravelle, *The Falkland (Malvinas) Islands: An International Law Analysis of the Dispute Between Argentina and Great Britain*, 107 MIL. L. REV. 5 (1985), and SYLVIE-STOYANKA JUNOD, PROTECTION OF THE VICTIMS OF THE ARMED CONFLICT FALKLAND-MALVINAS ISLANDS (1982), (ICRC, 1984).

²² *See* Memorandum, HQDA, DAJA-IA, subject: Geneva Conventions Status of Enemy Personnel Captured During URGENT FURY (4 Nov. 1983). *See also* JOHN NORTON MOORE, LAW AND THE GRENADA MISSION (1984).

²³ Initially, the U.S. official position was Panama was not an Article 2 conflict. *See* APPENDIX B. A primary argument was the legitimate Government of Panama invited us to assist them in reestablishing control of Panama after General Noriega nullified the free elections where Mr. Endara was elected President. To support this position, concurrent with the invasion, Mr. Endara was sworn in as President of Panama in the U.S. Southern Command Headquarters one hour before the invasion occurred; forces were already airborne en route. *See* General Accounting Office, Panama: Issues Relating to the U.S. Invasion 4, n.2 (April 1991)[GAO/NSIAD-91-174FS]. *See generally*, BOB WOODWARD, THE COMMANDERS 84, 182 (1991). *See also* Thomas Donnelly, MARGARET ROTH, and CALEB BAKER, OPERATIONS JUST CAUSE: THE STORMING OF PANAMA (1991), for details of the invasion.

After General Noriega's capture, he petitioned a federal court claiming POW status under the Geneva Conventions. While the U.S. argued General Noriega would be treated consistent with the Convention, they would not agree that he was, in fact, entitled to POW status. However, in *United States v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992), a district court judge found Panama was an article 2 conflict as a matter of law and granted POW status to the General. Noriega was ultimately tried, convicted, and sentenced in 1992 to 40 years on drug and racketeering charges. *See generally*, Laurens Grant, *Panama outraged by Noriega's TV appearance*, REUTERS, Apr. 26, 1996, *available in* LEXIS, News Library, CURNWS File and Larry King, *Noriega pleads case for release*, USA TODAY, Apr. 22, 1996 at 2D.

See generally, John Parkerson, *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31 (1991).

²⁴ *See* BARRY E. CARTER AND PHILLIP R. TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS 880 - 908 (1995)[hereinafter Carter and Trimble], for copies of the United Nations Security Council Resolutions and U.S. domestic documents authorizing the coalition's actions. *See generally*, DEP'T OF DEF., FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR (1992)[hereinafter DoD PERSIAN GULF REPORT], attached as APPENDIX A, and U.S. NEW AND WORLD REPORT STAFF, TRIUMPH WITHOUT VICTORY: THE UNREPORTED HISTORY OF THE PERSIAN GULF WAR (1992).

²⁵ According to Pictet:

- a. Has international recognition of the belligerents occurred?
 - b. Are there *de facto* hostilities?
 - c. Has the United States authorized the issuance of wartime awards and pay? (This is not dispositive. Recall: Two special forces sergeants received the Congressional Medal of Honor in Somalia, yet it was clearly not an Article 2 conflict!)
- 3. Another factor to consider is, are the combatants "parties" within the meaning of Article 2? For example, the warlord Aideed and his band in Somalia did not qualify as a "party" for purposes of the Geneva Conventions.
- B. Common Article 3: If it is an internal armed conflict combatants need only provide minimal human rights protections.
 - 1. Protocol II as a minimum standard by analogy?
 - a. United States is not a party to Protocol II.
 - b. Unlike Protocol I, it may reflect customary law.
 - c. Minimum standards at Article 4 (Fundamental Guarantees), Article 5 (Persons Whose Liberty Has Been Restricted), and Article 6 (Penal Prosecutions).
 - 2. The problem of Detainees.
 - a. Haiti.²⁶
 - b. Somali.²⁷

Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. Pictet, at 23.

²⁶ See Larry Rohter, *Legal Vacuum in Haiti is Testing U.S. Policy*, N.Y. TIMES, Nov. 4, 1994, at A32. See ALSO LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995: LESSONS LEARNED FOR JUDGE ADVOCATES, 59 - 72, and App. R (11 Dec. 95)[hereinafter Haiti AAR].

- c. Bosnia-Herzegovina.²⁸

XXXIX. THE RIGHT KIND OF PERSON

- A. Once a conflict rises to the level of common Article 2, Article 4, GPW, determines who is entitled to the status of a prisoner of war. Traditionally, persons were only afforded prisoner of war status if they meet certain preconditions. Those criteria are:
1. being commanded by a person responsible for their subordinates;
 2. having fixed distinctive insignia;²⁹
 3. carrying arms openly;³⁰ and,
 4. conducting their operations in accordance with the laws and customs of war.
 5. One must recognize that with coalition operations, other nations may apply a different standard; they may use Protocol I's criteria. Protocol I only requires combatants to be commanded by a person responsible for the organizations actions, comply with the laws of war, and have an internal discipline system. Art. 43 & 44, PI.

Note: The United States is NOT a party to Protocol I, but 147 nations are parties to the treaty.

²⁷ See Memorandum, CDR, Unified Task Force Somalia, to All Subordinate Unified Task Force Commanders, subj: Detainee Policy (9 Feb. 93).

²⁸ See Office of the Legal Counsel to Chairman, Joint Chiefs of Staff, Information Paper, subj: Legal status of aircrews flying in support of UNPROFOR (2 June 1995); Message, Joint Staff/SECSTATE, subj: POW Status of NATO Aircrews in Bosnia (200343Z Feb 94).

²⁹ For a discussion of the uniform requirement, see *In re Quirin*, 317 U.S. 1 (1942) and *Mohamadali and Another v. Public Prosecutor* (Privy Council, 28 July 1968), 42 I.L.R. 458 (1971). The first attempt to codify the uniform requirement necessary to receive POW status occurred during the Brussels Conference of 1874.

³⁰ This term carrying arms openly does NOT require they be carried visibly. However, the requirement rests upon the ability to recognize a combatant as just that. Protocol I changes this requirement in a significant way. Under the 1949 Convention, a combatant is required to distinguish himself throughout military operations. Art. 44(3), PI, only obligates a combatant to distinguish himself from the civilian population "while they are engaged in an attack or in a military operation preparatory to an attack, or in any action carried out with a view to combat." COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 527 (Y. Sandoz, C. Swinarski, and B. Zimmerman, eds. 1987).

- B. In addition, numerous other persons detained by military personnel are entitled to EPW status if "they have received authorization from the armed forces which they accompany." (i.e., possess a GC identity card from a belligerent government). Specific examples include:
1. Contractors;
 2. Reporters;³¹
 3. Civilian members of military aircraft crews;
 4. Merchant marine and civil aviation crews;
 5. Persons accompanying armed forces (dependents);³² and,
 6. Mass Levies (Levee en Masse). To qualify these civilians must:
 - a. be in non-occupied territory;
 - b. act spontaneously to the invasion; and,
 - c. carry their arms visibly.³³
 - d. Contrast this with organized resistance movements.
 7. This is NOT an all inclusive list. One's status as a prisoner of war is a question of fact.

³¹ See Hans-Peter Gasser, *The Protection of Journalists Engaged in Dangerous Professional Missions*, INT'L REV. RED CROSS (Jan/Feb. 1983), at 3. See also KATE WEBB, ON THE OTHER SIDE (1972) (journalist held for 23 days in Cambodia by the Viet Cong).

³² See Stephen Sarnoski, *The Status Under International Law of Civilian Persons Serving with or Accompanying Armed Forces in the Field*, ARMY LAW. (July 1994), at 29. See generally, MEMORANDUM FOR THE ASSISTANT JUDGE ADVOCATE GENERAL (CIVIL LAW), SUBJ: Civilians in Desert Shield -- INFORMATION MEMORANDUM (26 Nov. 1992).

³³ See Pictet, at 67.

FM 27-10, ¶65 says all males of military ages may be held as POWs. The GPW does not discriminate the right to detain by gender and therefore females may be detained as well.

- a. The possession of a belligerent government issued identification card is weighed heavily.
 - b. Prior to 1949, possession of an identification card was a prerequisite to EPW status.³⁴
- C. Medical and religious personnel (Retained personnel) receive the protections of GPW plus (Art. 4C & 33, GPW).
 1. Retained personnel are to be repatriated as soon as they are no longer needed to care for the prisoners of war.³⁵
 2. Of note, retained status is not limited to doctors, nurse, corpsman, etc. It also includes, for example, the hospital clerks, cooks, and maintenance workers.³⁶
- D. Persons whose POW status is debatable:³⁷
 1. Deserters/Defectors;³⁸
 2. Saboteurs;

³⁴ See Article 81, Geneva Convention Relative to the Treatment of Prisoners of War of July 27, 1929, *reprinted in*, Pictet, at 683. See also DEP'T OF DEF., INST. 1000.1, IDENTITY CARDS REQUIRED BY THE GENEVA CONVENTION (30 January 1974).

³⁵ This is one of the most abused provisions of the Geneva Conventions. The last time this author knows of this occurring was by the United States during World War I. During hostilities we repatriated 59 medical officers, 1,783 sanitary personnel, including 333 members of the German Red Cross. FINAL REPORT OF GENERAL JOHN J. PERSHING HQ, AEF Sept. 1, 1919, *reprinted in* XVI THE STORY OF THE GREAT WAR (1920), at App., p. lvii.

³⁶ See I INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY TO THE GENEVA CONVENTION FOR AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 218 - 258 (Pictet ed. 1952)(Articles 24 - 28). See generally, ALMA BACCINO-ASTRADA, MANUAL ON THE RIGHTS AND DUTIES OF MEDICAL PERSONNEL IN ARMED CONFLICTS (ICRC, 1982) and Liselotte B. Watson, *Status of Medical and Religious Personnel in International Law*, JAG J. 41 (Sep-Oct-Nov 1965).

³⁷ See Levie, at 82 - 84; Richard R. Baxter, *So-Called 'Un privileged Belligerency': Spies, Guerrillas, and Saboteurs*, MIL. L. REV. BICENTENNIAL ISSUE 487 (1975)(Special Ed.); Albert J. Esgain and Waldemar A. Solf, *The 1949 Geneva Convention Relative to the Treatment of Prisoners of War: Its Principles, Innovations, and Deficiencies*, MIL. L. REV. BICENTENNIAL ISSUE 303 (1975)(Special Ed.).

³⁸ See Memorandum, HQDA, DAJA-IA, 22 January 1991, SUBJECT: Distinction Between Defectors/Deserters and Enemy Prisoners of War. See also Levie, at 77 - 78; James D. Clause, *The Status of Deserters Under the 1949 Geneva Prisoner of War Convention*, 11 MIL. L. REV. 15 (1961); and, L.B. Schapior, *Repatriation of Deserters*, 29 BRIT. YB. INT'L L. 310 (1952).

3. Military advisors; and,
 4. Belligerent diplomats.
- E. Persons not entitled to POW status:
1. Spies (Art. 29, HR and Art. 46, PI);
 2. Mercenaries³⁹ (Art. 47, PI);
- **U.S. disagrees with this view.**
- F. What is the status of U.N. personnel during peace enforcement operations?⁴⁰

XL. WHAT IF AN EPWS STATUS IS IN DOUBT?

- A. Policy: Always initially treat as POWs.
- B. Law: Article 5, GPW: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.
- C. U.S. policy is to convene a three member panel (FM 27-10, ¶71c). Their role is to ascertain facts, not to adjudicate any type of punishment.
1. A good guide is to simply use informal AR 15-6 proceedings with a 3 member board.
 2. During Operation Desert Storm we conducted 1,196 Article 5 tribunals.⁴¹
 3. What is the JA's role?⁴²

³⁹ See John R. Cotton, *The Rights of Mercenaries as Prisoners of War*, 77 MIL. L. REV. 144 (1977).

⁴⁰ See Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 49/59, 49 U.N. GAOR Supp. (No. 49), at 299, U.N. Doc. A/49/49 (1994).

⁴¹ DoD PERSIAN GULF REPORT, at 578.

4. Who appoints the Article 5 tribunal? There is no law on this. Using the GCMCA is a pretty good rule.

D. Recall: Article 5 tribunals are not always necessary.

XLII. TREATMENT AS A MATTER OF POLICY: WHY DO WE DO THIS?

- A. We train our soldiers to always treat captured persons as EPWs. (Doctrine)
- B. We want our soldiers to receive POW treatment from our adversary. (Reciprocity)
- C. We may be wrong in our analysis and one can rarely be criticized for affording persons greater protections than they are otherwise entitled.⁴³ (Public perception)

XLII. CAPTURE - THE 5 SS (SEARCH, SILENCE, SEGREGATE, SAFEGUARD, SPEED TO THE REAR)⁴⁴ [ART. 13,16,17,19,20 GPW].

- A. Who has the authority to detain? (ROE issue?)
 1. Express - mission statement.
 2. Implied - type of mission.
 3. Inherent - self-defense/force protection.

⁴² See, e.g., U.S. CENTRAL COMMAND, REGULATION 27-13, LEGAL SERVICES - CAPTURED PERSON: DETERMINATION OF ELIGIBILITY FOR ENEMY PRISONER OF WAR STATUS (7 Feb. 95), for guidance about, and procedures for, actually conducting, Article 5 tribunals.

⁴³ See generally, *U.S. v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992). Of note, the U.S. chose not to appeal the decision.

⁴⁴ DEP'T OF ARMY, FIELD MANUAL 19-40, ENEMY PRISONERS OF WAR, CIVILIAN INTERNEES AND DETAINED PERSON (Feb. 1976), at ¶2-4. An important component of the 5Ss often neglected is speed to the rear. EPWs can be on the move for days before they reach their final camp. According to FM 19-40, the echelon having custody of the EPW has responsibility to provide the prisoner sufficient rations during the move. *Id.*, at ¶2-9.

See John L. Della Jacono, *Desert Storm Team EPW*, MILITARY POLICE (June 1992), at 7, for a discussion of MP EPW operations during Operation Desert Storm.

- B. When do their treatment rights begin? ". . .[F]rom the time they fall into the power of the enemy. . . ." ⁴⁵ (Art. 5, GPW).
- C. How do I secure them?
1. handcuffs (flexcuffs) and blindfolds.
 2. shirts pulled down to the elbows.
 3. protect against public curiosity.
 - a. Art. 13 does not per se prohibit photographing an EPW. Photos may not degrade or humiliate an EPW. In addition, balance harm to an EPW and family against news media value. Bottomline: strict guidelines required. ⁴⁶
 - b. This is in stark contrast to Iraq and North Vietnam's practice of parading P.O.W.s before the news media.
 4. POW capture tags (DA Form 5976).
- D. What do I take from an EPW?

⁴⁵ During Desert Storm some Iraqi Commanders complained that the Coalition forces did not fight "fair" because our forces engaged them at such distances and with such overwhelming force that they did not have an opportunity to surrender. Additionally, some complained that they were merely moving into position to surrender. However, the burden is upon the surrendering party make his intentions clear, unambiguous, and unequivocal to the capturing unit.

In the case of *United States v. Griffen*, 39 C.M.R. 586 (A.B.R. 1968), *pet. denied*, 39 C.M.R. 293 (C.M.A. 1968), a general court-martial convicted an army staff sergeant of murder for killing a Vietnamese prisoner of war on the order of his platoon leader.

⁴⁶ See DEP'T OF DEF., FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR (April 1992), at 618. DEP'T OF ARMY, REGULATION 190-8, ENEMY PRISONERS OF WAR ADMINISTRATION, EMPLOYMENT, AND COMPENSATION ¶ 2-15 (2 Dec 85) provides:

- a. EPW will not be photographed except in support of medical documentation, for official identification, or for other purposes described in this regulation.
- b. Interviews of EPW by news media will not be permitted. For purposes of this regulation the term "interview" includes any medium whereby prisoners release information or statements for general publication. It includes, but is not limited to, the taking of still or motion pictures concerning EPW for release to the general public, and telephone, radio, or television interviews or appearances, or mailing material apparently for distribution to the general public.
- c.

1. helmet;
2. wallet;
3. protective clothing;⁴⁷
4. shoes or shoe laces;
5. identity card; and,
6. rucksack/luggage.
7. Art. 18, GPW allows POWs to **retain** all of the above.⁴⁸
8. But what about captured persons not entitled to EPW status? See Art 97, GCC.⁴⁹ - Does this make sense for security reasons?
9. War trophies. It has consistently been the U.S. policy to limit the types and amounts of property taken from the battlefield and retained by the individual soldier. All enemy property captured is the property of the U.S. However, the personal property of EPWs is usually protected from confiscation and seizure.⁵⁰ Soldiers are not even supposed to barter with EPWs for personal items.⁵¹ However, because of perceived abuses that occurred in not enforcing this policy, Congress legislated two important provisions: 10 U.S.C. §2579⁵² and 50 U.S.C. §2201.⁵³ DoD has yet to implement regulations on the procedures for handling and retaining battlefield objects.

⁴⁷ Ltr, HQDA, DAJA-IA 1987/8009, subj: Protective Clothing and Equipment for EPWs.

⁴⁸ See also, Pictet, at 166, n. 2.

⁴⁹ Art. 97 essentially allows the military to seize, but not confiscate, personal property of those civilians protected by the Fourth Convention. The difference is important. Confiscate means to take permanently. Seizing property is a temporary taking. Property seized must be receipted for and returned to the owner after the military necessity of its use has ended. If the property cannot be returned for whatever reason, the seizing force must compensate the true owner of the property. See Chapter 9, OPLAW HANDBOOK (1997) and Elyce K.K. Santerre, *From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield*, 124 MIL L. REV. 111 (1989), for a more detailed discussion of the distinction between, requisition, seizure, and confiscation of private property and when it is lawful to do so.

⁵⁰ See Levie, at 110 - 118.

⁵¹ FM 27-10, ¶94b.

⁵² Despite the Congressional requirement in 1994 for DoD to establish regulations for handling war trophies within 270 days of the statute's enactment, DoD has yet to provide any DoD level guidance on how to handle these objects.

- E. Rewards for the capture of EPWs are permissible, but they must avoid even the hint of a “wanted dead or alive” mentality.⁵⁴
- F. What can I ask a EPW? ANYTHING!!
1. All POWs are required to give: (Art. 17, GPW)
 - a. surname, first name;
 - b. rank;
 - c. date of birth; and,
 - d. serial number.
 2. What if an EPW refuses to provide his rank?
- continue to treat as POW: an E-1 POW.⁵⁵
 3. What if an EPW claims to be an officer or NCO but does not possess a GC identification card?
 - a. AR 190-8, ¶12-12b provides: Such persons "will be classified and treated as privates, unless special circumstances warrant recognition of higher grade and their status is approved by HQDA or the theatre Army commander" (emphasis added).

⁵³ Commonly called The Spoils of War Act of 1994, it limits the transfer of captured enemy movable property to the same procedures applicable to the similar military property. (i.e., Arms Export Control Act). It excludes "minor articles of personal property which have lawfully become the property of individual members of the armed forces as war trophies pursuant to public written authorization from the Department of Defense." 50 U.S.C. §2205. The obvious intent was to exempt war trophies as outlined in 10 U.S.C. §2579. However, the legislation is poorly written. Art. 18, GPW prohibits this. Only enemy public property may be seized. Enemy public property frequently includes property of a soldier used for his personal use (i.e. TA-50, a weapon). That type of property is different than a soldier's personal property.

⁵⁴ The U.S. issued an offer of reward for information leading to the apprehension of General Noreiga. Memorandum For Record, Dep't of Army, Office of the Judge Advocate General, DAJA-IA, subj: Panama Operations: Offer of Reward (20 Dec. 1989). This is distinct from a wanted “dead or alive” type award offer prohibited by the Hague Regulations. See FM 27-10, ¶31 (interpreting HR, art. 23b to prohibit “putting a price upon an enemy’s head, as well as offering a reward for an enemy ‘dead or alive.’”).

⁵⁵ GPW, art. 17, para. 2. See also Pictet, at 158 - 9.

- (1) Does this make sense?
 - (2) Does this comply with the GPW? See Art. 43, 44, and 49, GPW. (Probably not).
4. No torture, threats, coercion in interrogation (Art. 17, GPW). **Its not what you ask but how you ask it.**⁵⁶
- a. What about use of truth serum? No, violates GPW.⁵⁷
 - b. NK water torture of feet during the winter clearly violated Art. 17.⁵⁸

⁵⁶ 15 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 101 n. 4 (1949) See Stanley J. Glod and Lawrence J. Smith, *Interrogation Under the 1949 Prisoners of War Convention*, 21 Mil. L. Rev. 145 (1963); III COMMENTARY, *supra*, at 163 - 4; Levie, at 106 - 109.

There may be tensions between the military police and the military intelligence communities in this area, especially in operations other than war. The Army has charged the military police branch with responsibility for administering EPWs and Civilian Internees. See Chapter 1, AR 190-8; DEP'T OF THE ARMY, REGULATION 190-57, MILITARY POLICE: CIVILIAN INTERNEE - ADMINISTRATION, EMPLOYMENT, AND COMPENSATION (4 Mar. 1987); and FM 19-40. Military Police units use these regulations as their guide in OOTW. Both regulations prohibit any physical or moral coercion. See AR 190-47, para. 1-5; AR 190-8, para. 1-5d. See also FM 19-40, para. 1-13d. However, prisoners of war provide a prime resource of intelligence information. See DoD PERSIAN GULF REPORT, at 585 - 586, and Haiti AAR, at 53 - 56. Consequently, military intelligence personnel use various interview techniques to acquire information. See, e.g., DEP'T OF THE ARMY, FIELD MANUAL 34-52, INTELLIGENCE: INTERROGATION (28 Sept. 1992). These techniques may appear to be inconsistent with military police guidance. The judge advocate should become involved to ensure the interrogations comply with a detainee's rights, yet affords the intelligence officer the latitude to utilize interrogation techniques authorized under the applicable law.

U.S. P.O.W.s have routinely been subjected to torture by their captors. In the Persian Gulf War, all 23 American P.O.W.s were tortured. In one technique called the "talkman," a device was wrapped around the prisoner's head and then attached to a car battery. See Melissa Healy, *Pentagon Details Abuse of American POWs in Iraq; Gulf War: Broken Bones, Torture, Sexual Threats are reported. It could spur further calls for War Crimes Trials*, L.A. TIMES, Aug. 2, 1991, at A1. See also Nora Zimchow, *Ex-POW's Tail of a Nightmare; Marine Flier Guy Hunter Endured 46 Days of Physical and Psychological Torture in Iraqi Hands. He finally made a videotape denouncing the war, believing he might not live*, L.A. TIMES, Mar. 31, 1991, at A1. The Iraqis did not limit their mistreatment to only U.S. prisoners. See *Iraqi torturers failed to crack SAS soldier's cover story*, THE HERALD (Glasgow), Oct. 13, 1993, at 9, available in LEXIS, Nexis Library, ARCNEWS file.

For a description of the interrogation techniques used by the communists during the Korean War, see S. RPT. NO. 2832, COMMUNIST INTERROGATION OF AMERICAN PRISONERS, 84th Cong., 2d Sess. (1957); S. COMM. ON GOV'T OP., COMMUNIST INTERROGATION, INDOCTRINATION, AND EXPLOITATION OF AMERICAN MILITARY AND CIVILIAN PRISONERS, 83rd Cong., 2d Sess. (1956).

⁵⁷ See OTJAG opinion: JAGW 1961/1157, 21 June 1961.

⁵⁸ See Ministry of Defence, United Kingdom, *Treatment of British Prisoners of War in Korea* (HMSO, 1955), reprinted in, Levie, DOCUMENTS ON PRISONERS OF WAR, at 651, 662. This article provides a compelling account of the inhumane treatment provided U.N. P.O.W.s generally during the Korean War.

- c. Techniques such as placing the EPW at attention during interrogation, planting a cell mate, or concealing a microphone in the POWs cell does not violate Art. 17.⁵⁹
- d. It may often be difficult to determine where lawful interrogation actions end and unlawful actions begin. Use of a common sense indicator is always helpful. One should ask themselves: if these actions were perpetrated by the enemy against American POWs, would you believe such actions violate international or U.S. law? If the answer is yes, avoid the interrogation techniques.⁶⁰

5. Your U.S. military ID card is your GC card.

NOTE: Categories are I to V. What is yours? See Art. 60, GPW.

XLIII. EPW DETENTION FACILITIES.⁶¹

A. Locations?

- 1. Land only (Art 22, GPW). However, during the Falklands War the British temporarily housed Argentine EPWs on ship while in transit to repatriation.
- 2. Not near military targets (Art 23, GPW).⁶² During the Falklands War, several Argentine EPWs were killed while moving ammunition away from their billets.

B. Responsibility for camps - a National responsibility (Art. 10,12 GPW), NOT transferable to the U.N.

- 1. Who are the players?

⁵⁹ See DEP'T OF ARMY, FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION 3-11 (28 Sept. 92) and Glod and Smith, *supra*, at 155.

⁶⁰ See FM 34-52, *supra*, at 1-9.

⁶¹ For a historical recount of some of the most horrific treatment of conditions faced by P.O.W.s in any war, see GAVAN DAWES, PRISONERS OF THE JAPANESE: POWS OF WORLD WAR II IN THE PACIFIC (1994). Compare conditions U.S. P.O.W.s have historically suffered with the treatment U.S. forces have historically afforded their prisoners. See, e.g., Jack Fincher, *By Convention, the enemy within never did without*, SMITHSONIAN (June 1995), at 126 (an account of U.S. treatment of German P.O.W.s during World War II) and Gary Marx, *Panama prison camp no Stalag 17*, CHI. TRIB., Jan. 8, 1990.

⁶² Iraq used U.S. and allied P.O.W.s during the Persian Gulf War as human shields in violation of Art. 19 & 23, GPW. See *Iraqi Mistreatment of POWs*, DEP'T OF STATE DISPATCH, Jan. 28, 1991, at 56 (Remarks by State Department Spokesman Margaret Tutwiler). See also DEP'T OF DEF., FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR (April 1992), at 619 - 620.

- a. Commander.
- b. MP brigades⁶³ (FM 19-40, AR 190-8).
 - (1) AC units.
 - (2) RC units⁶⁴ (i.e., 800th MP Bde).
- c. Division/ Corps Band (FM 71-100, at 2-11).
- d. Military Intelligence (FM 71-100, at 2-7).
- e. Judge Advocate (FM 27-100, para. 7-3b).
- f. ICRC (Art. 125, 126 GPW; Art. 143, GCC)
 - (1) Who are these guys?⁶⁵
 - (2) Who is the command's liaison? JAs by doctrine!⁶⁶ Why?
- g. Other "relief agencies" See JCS Pub 3-08, INTERAGENCY COORDINATION DURING JOINT OPERATIONS, App. B (31 Jan 95)(First Draft), for a list and brief summary of their objectives.

2. Camp Identification required ("PW" or "PG") (Art. 23, GPW).

C. Duty to segregate by: (Art. 16, 25, & 45, GPW).

1. rank;

⁶³ See generally, Jon Bilbo, Enemy Prisoners of War (EPW) Operations During Operations Desert Storm (Army War College Study Project, 1992).

⁶⁴ John Brinkerhoff, Ted Silva, and John Seitz, United States Army Reserve in Operation Desert Storm. Enemy Prisoner of War Operations: The 800th Military Police Brigade (June 1992), available in DTIC, ref # AD-A277 768.

⁶⁵ See INT'L COMM. RED CROSS, PRESENTING THE ICRC (1985).

⁶⁶ DEP'T OF THE ARMY, FIELD MANUAL 71-100-2, INFANTRY DIVISIONS OPERATIONS: TACTICS, TECHNIQUES, AND PROCEDURES (31 Aug. 93), at 6-28.

2. sex (Iraqi soldiers sexually assaulted MAJ Rhonda Cornum during her captivity);⁶⁷
3. age;
 - a. special protections for children exist as a direct result of their usage during WW II.⁶⁸
 - (1) children under age 15 separated from their families must be separated from the other EPWs.
 - (2) children under 12 should have "dog tags" or similar device to identify them even further.
 - b. The problem continues: Vietnam, Somalia, Sudan, and Liberia.⁶⁹ During the Iran/Iraq war, Iraq conscripted 14 year old children to fight on its frontlines.⁷⁰

⁶⁷ See Elaine Sciolino, *Women in War: Ex-Captive Tells of Ordeal*, N.Y. TIMES, June 29, 1992, at A1; and, Grant Willis, *Pentagon fears reaction to women POWs*, NAVY TIMES, June 29, 1992; *The Gulf War* (BBC1 broadcast, Jan. 16, 1996); Emma Gilbey, *The shocking end to one woman's war In one of the least known episodes of the Gulf war, an American army doctor was shot down and then, despite terrible injuries, sexually molested by an Iraqi soldier. But Rhonda Cornum plays down her suffering as she described her ordeal to Emma Gilbey*, THE DAILY TELEGRAPH, Jan. 16, 1996, available in LEXIS, Nexis Library, CURNWS File. Women prisoners of war are not new to the battlefield. Sixty-seven female nurses were held as prisoners of war for three years in a Japanese camp on the Philippines during World War II. See SHARON COSNER, WAR NURSES (1988). There exists at least one case of a female POW being executed by her captors. During World War I, the Germans charged Nurse Edith Cavell with assisting Allied prisoners escape. See U.S. DEPT OF STATE, PAPERS RELATING TO FOREIGN RELATIONS OF THE UNITED STATES, *The Lansing Papers 1914-1920* 48-68 (1939). Women have historically served with American men on the battlefield. At least two women served as privates during the Revolutionary War. We know this because they received pensions for their service. HERBERT FOOKS, PRISONERS OF WAR 68 (1924). See also *id.* at 68-70. Also the first and only woman to receive the Medal of Honor, Dr. Mary Walker, spent four months as a prisoner of war in a Richmond camp. ABOVE AND BEYOND: A HISTORY OF THE MEDAL OF HONOR FROM THE CIVIL WAR TO VIETNAM 38 - 9 (1985).

⁶⁸ Art. 14 and 38, GPW, as well as Art. 24, GCC. See Pictet, III COMMENTARY, at 148, n. 1; *Convention on the Rights of the Child*, 28 I.L.M. 1448 (1989), reprinted in, Carter and Trimble, *supra*, at 455. While the U.S. has not ratified this convention, at least 154 other countries have. See also ILENE COHN & GUY S. GOODWIN-GILL, CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICT (1994) and Maria Teresa Duluti, *Captured Child Combatants*, INT'L REV. RED CROSS, no. 278 (Oct. - Nov. 1990), at 421.

⁶⁹ CHILDREN IN SUDAN: SLAVES, STREET CHILDREN AND CHILD SOLDIERS 54 - 71 (Human Rights Watch, 1995); THE LOST BOYS: CHILD SOLDIERS AND UNACCOMPANIED BOYS IN SOUTHERN SUDAN (1994); *Liberia Human Right Practices*, 1993, DEPARTMENT OF STATE, DISPATCH (Feb. 1994); Child Soldiers in Liberia (Human Rights Watch, 1994); Michelle Morris, *Human Rights Watch begins to tackle children's human rights*, HUMAN RIGHTS WATCH, vol. 12, no. 2, p. 1,4 (Summer/Fall 1994). A U.N. study entitled "Promotion and Protection of the Rights of Children" identifies El Salvador, Guatemala, Lebanon, Liberia, Mozambique, Palestine, Peru, the Philippines, Sri Lanka and Turkey as nations that use female children as soldiers. See Thalif Deen, *Children: U.N. Seeks to Raise*

4. religion, ethnic background??⁷¹ Segregation by these beliefs may be required especially when they are a basis for the conflict.
 - **Yugoslavia: Serbs, Croats, Muslims**
 - **Rwanda: Hutus, Tutsis**
 - **Chechnya**
5. political beliefs. Art. 38, GPW, encourages the practice of intellectual pursuit. However, the U.N. experience in EPW camps demonstrated that pursuit of political beliefs can cause great discipline problems within a camp. In 1952, on Koje-do Island, riots broke out at the EPW camps instigated by N. Koreans EPW communist activists. Scores of prisoners sympathetic to South Korea were murdered by N. Korean EPW extremist groups. During the rioting, EPWs captured the camp commander, Brigadier General Dodd.⁷²

D. What must be provided?

1. Quarters equal to Detaining forces (Art. 25, GPW)
-total surface & min. cubic feet
2. Adequate clothing considering climate (Art. 27, GPW)

Age Limit on Child Soldiers, INTER PRESS SERVICE, Nov. 16, 1994, available in LEXIS, Nexis Library, ALLNWS File.

⁷⁰ See Coleen Maher, *The Protection of Children in Armed Conflict: A Human Rights Analysis of the Protections Afforded to Children in Warfare*, 9 B.C. THIRD WORLD L. J. 297 (1989)(cites an 1983 U.N. report of Iran conscripting children for its frontlines); Maryam Elahi, *The Rights of the Child Under Islamic Law: The Prohibition of the Child Soldier*, 19 COLUM. HUM. RTS. L. REV. 259, 277 - 79 (1988)(outlining Iran's use of children during the Iran-Iraq War which included their use as cannon fodder and mine sweepers); *Iran Condemned for Using Child Soldiers*, AP, Sept. 6, 1983. See also *Sadeghi v. United States*, 40 F.3d 1139, 1146 (10th Cir., 1994)(Kane, S.J., dissenting). See generally, SAVE THE CHILDREN, CHILDREN AT WAR (1994); Sandra Singer, *The Protection of Children During Armed Conflict*, INT'L REV. RED CROSS, No. 252 (May/June 1986), at 133; Howard Mann, *International Law and the Child Soldier*, 36 INT'L & COMP. L.Q. 32 (1987)

⁷¹ Art. 34, GPW. One of the most tragic events of religious discrimination by a detaining power for religious reasons was the segregation by the Nazis of Jewish American Prisoners of War. Several Jewish American soldiers were segregated from their fellow Americans and sent to slave labor camps where "they were beaten, starved and many literally worked to death." MITCHELL G. BARD, FORGOTTEN VICTIMS: THE ABANDONMENT OF AMERICANS IN HITLER'S CAMPS (1994). See also Trial of Tanaka Chuichi and Two Others in UNITED NATIONS WAR CRIMES COMMISSION, XI LAW REPORTS OF WAR CRIMES TRIALS 62 (1949) (convicting Japanese prison guards, in part, for intentionally violating the religious practices of Indians of the Sikh faith).

⁷² DEP'T OF THE ARMY, OFFICE OF THE PROVOST MARSHALL, REPORT OF THE MILITARY POLICE BOARD NO. 53-4, COLLECTION AND DOCUMENTATION OF MATERIAL RELATING TO THE PRISONER OF WAR INTERNMENT PROGRAM IN KOREA, 1950-1953 (1954). See also WALTER G. HERMES, TRUCE TENT AND FIGHTING FRONT (1966), at 232-63; *The Communists War in POW Camps*, Dep't of State Bulletin, Feb 6, 1953, at 273; Harry P. Ball, *Prisoner and War Negotiations: The Korean Experience and Lesson*, in 62 INTERNATIONAL LAW STUDIES: THE USE OF FORCE, HUMAN RIGHTS AND GENERAL INTERNATIONAL LEGAL ISSUES, VOL. II, 292- 322 (Lillich & Moore, eds., 1980).

3. Canteen? (Art 28, GPW) Does this make sense?⁷³
4. What about Tobacco? Yes (Art. 26, GPW).⁷⁴
5. Recreation (Art. 38, GPW).
6. Religious accommodation (Art. 34, GPW).
7. Food accommodation (Art. 26 & 34, GPW).
 - **pork MREs in Muslim country?**
 - **use enemy food stocks.**
 - **let them fix their own food.**
8. Copy of GPW in POWs own language. Where do I get a copy in Arabic?

ICRC
Delegation to the UN
801 2nd Ave, 18th Fl,
New York, NY 10017
(212) 599-6021
FAX: (212) 599-6009

9. Due process (Art 99 - 108, GPW).
 10. Hygiene (Art. 29, GPW).
 - **cultural aspects**
 - **issues w/ women & children**
- E. EPW accountability⁷⁵ (Art. 122 & 123, GPW).
1. Capture notification -- PWIS. This system was utilized during Operations Desert Storm and Operation Uphold Democracy.

⁷³ The U.S. does not provide EPWs with a canteen, but instead provides each EPW with a health and comfort pack. Memorandum, HQDA-IP, 29 Oct. 94, subj: Enemy Prisoner of War Health and Comfort Pack.

⁷⁴ See Memorandum, HQDA-IO, 12 Sept. 94, subj: Tobacco Products for Enemy Prisoners of War. During Desert Storm, the 301st Military Police EPW camp required 3500 packages of cigarettes per day. *Operation Deserts Storm: 301st Military Police EPW Camp Briefing Slides*, available in TJAGSA, ADIO POW files. See also WILLIAM G. PAGONIS, MOVING MOUNTAINS: LESSONS IN LEADERSHIP AND LOGISTICS FROM THE GULF WAR 10 (1992), for LTG Pagonis' views about being told he must buy tobacco for EPWs.

⁷⁵ See Vaughn A. Ary, *Accounting for Prisoners of War: A Legal Review of the United States Armed Forces Identification and Reporting Procedures*, ARMY LAW., August 1994, at 16, for an excellent review of the United States system of tracking EPWs. See also Robert G. Koval, *The National Prisoner-of-War Information Center*, MILITARY POLICE (June 1992), at 25.

2. EPW personal property (Art. 16, GWS) (AR 190-8).
 3. EPW death (Art. 120 & 121, GPW).
 - a. 8 POWs died while under U.S. control during Desert Storm, 3 more died under Saudi control after transfer from U.S. custody.
 - b. any death or serious injury to a POW requires an official inquiry.
 4. Reprisals against EPWs is prohibited (Art. 13, GPW).⁷⁶
- F. Transfer of POWs (Art. 46 - 48, GPW).
1. Belligerent can only transfer EPWs to nations who are parties to the Convention.
 2. Detaining Power remains responsible for POWs care.

⁷⁶ In Vietnam, by 1965 scores of U.S. servicemen had become prisoners of war. We argued for full protections under the GPW as by mid-1965 the hostilities had risen to the level of an armed conflict. *See Letter from the ICRC to the Secretary of State dated 11 June 1965*, 4 I.L.M. 1171 (1965); *U.S. Continues to Abide by Geneva Conventions of 1949 in Viet Nam*, DEP'T OF STATE BULLETIN, Sept. 13, 1965, p. 3. N. Vietnam argued that they were committing "acts of piracy and regard the pilots who have carried out pirate raids . . . as major criminals. . . ."

Hanoi said to Hint Trial of Americans, N.Y. TIMES, Feb. 12, 1966, at A12. *See also Hearings on American Prisoners of War in Southeast Asia 1971 before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 92d Cong., 1st Sess., at 448 - 49 (1971).

To complicate matters, the U.S. initially transferred captured Viet Cong to South Vietnam. South Vietnam considered the V.C. insurgents subject solely to their domestic law, and routinely denied EPW status to them. Shortly after the trial and execution of several Viet Cong by the South Vietnamese government, North Vietnam retaliated by executing Captain Humbert R. (Rocky) Versace and Sergeant Kenneth Roarback in September 1965. *See Neil Sheehan, Reds' Execution of 2 Americans Assailed by U.S.*, N.Y. TIMES, Sept. 28, 1965, at A1. Shortly thereafter, the U.S. policy towards the Viet Cong changed. U.S. policy became, V.C. captured "on the field of battle" would be afforded POW status. *See U.S. MILITARY ASSISTANCE COMMAND, VIETNAM, DIRECTIVE 381-11, Exploitation of Human Sources and Captured Documents*, 5 August 1968. *See also THE HISTORY OF MANAGEMENT OF POWS: A SYNOPSIS OF THE 1968 US ARMY PROVOST MARSHAL GENERAL'S STUDY ENTITLED "A REVIEW OF UNITED STATES POLICY ON TREATMENT OF PRISONERS OF WAR"* (1975), at 49 - 55. Captain Versace was from Madison, Wisconsin and graduated from West Point in 1959. *See UNITED STATES MILITARY ACADEMY, THE 1959 HOWITZER 473* (1959)(includes a picture of Captain Versace).

Acts of reprisals have not always been prohibited. In fact, during the Civil War, the War Department issued General Order 252 of 1863 whereby President Lincoln ordered that "for every soldier of the United States killed in violation of the laws of war, a rebel soldier shall be executed; and for every one enslaved by the enemy or sold into slavery . . . a rebel soldier shall be placed at hard labor on the public works, and continued at such labor until the other shall be released and receive treatment due to a prisoner of war. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 796 (2d ed. 1920).

- a. There is no such thing as a "U.N." or "coalition" EPW!⁷⁷
 - b. To ensure compliance with the GPW, U.S. Forces routinely establish liaison teams and conduct GPW training with allied forces prior to transfer EPWs to that nation.⁷⁸
 - c. Requires Assist. SecDef for International Security Affairs approval.⁷⁹
- G. Complaints and Prisoners' Representatives (Art 78-81, GPW).
 - 1. Voting for a PR conflicts with Code of Conduct SRO requirement.
 - 2. SRO will take command.
 - 3. EPWs have standing to file a Habeas Corpus action under 28 U.S.C. §2255 to seek enforcement of their GPW rights.

XLIV. EPW LABOR⁸⁰ (AR 190-8, READ IT!).

- A. Rank has its privileges.
 - 1. Officers: can't compel them to work.
 - 2. NCOs: you can compel them to supervise only.
 - 3. Enlisted: you can compel them to do manual labor.

⁷⁷ See Albert Esgain and Waldemar Solf, *The 1949 Geneva Convention Relative to the Treatment of Prisoners of War: Its Principles, Innovations, and Deficiencies*, MIL. L. REV. BICENT. ISSUE 303, 328-330 (1975), for a discussion of the practical problems faced with this provision.

⁷⁸ See, e.g., Memorandum of Agreement Between the United States of America and the Republic of Korea on the Transfer of Prisoners of War/Civilian Internees, signed at Seoul February 12, 1982, T.I.A.S. 10406. See also UNITED STATES FORCES KOREA, REGULATION 190-6, ENEMY PRISONERS TRANSFERRED TO REPUBLIC OF KOREA CUSTODY (3 Apr. 1992). See also DoD PERSIAN GULF REPORT, at 583; and, Haiti AAR, *supra* note 19, 59 - 72 and App. R , for an overview of Detainee operations in Haiti.

⁷⁹ DoD DIR. 2310.1, ¶C(3).

⁸⁰ See Howard S. Levie, *The Employment of Prisoners of War*, 23 MIL. L. REV. 41, and Levie, at 213 - 254. See generally, Frank Kolar, *An Ordeal That Was Immortalized: Not all was fiction in the story of the bridge on the River Kwai*, MIL. HISTORY (Feb. 1987), at 58.

4. If they work, you must pay them.
 5. Retained Personnel.
- B. Detainee status.⁸¹
- C. Compensation (Art. 60, GPW).⁸²
- 8 days paid vacation annually? (Art. 53, GPW)
- D. Type of Work
1. Aiding the armed conflict effort? No
 2. Dangerous work? No, unless they volunteer.
- SRO volunteers his soldiers to move artillery shells from near the POW camp?
 3. Work on the camp itself?
 - a. building housing.
 - b. running concertina wire around their compound (Can you vs. should you?).

XLV. CAMP DISCIPLINE.

- A. Disciplinary sanctions (Art. 15 type punishment).
1. Must relate to breaches of camp discipline.
 2. Only 4 types of punishments authorized (Art. 88, GPW). Max. punishments are: (Art. 90, GPW).⁸³

⁸¹ See Art. 40 & 51, GCC for an analogy. Detainee work should relate to feeding, sheltering, clothing, transport, and the health of other detainees or other nationals of the near-occupied territory.

⁸² See DEP'T OF THE ARMY REGULATION 37-1, FINANCIAL ADMINISTRATION: ARMY ACCOUNTING AND FUND CONTROL (30 Apr. 1991), Chapter 36.

⁸³ The GCC provides the same maximum punishments for civilian internees. See Art. 119, GCC.

- a. Fine: 1/2 pay up to 30 days.
 - b. Withdrawal of privileges, not rights.
 - c. 2 hours of fatigue duty per day for 30 days.
 - d. Confinement for 30 days (Art. 87, 89, 90, 97, & 98, GPW).
 - 3. Imposed by the camp commander (Art. 96, GPW).
- B. Judicial sanctions.
- 1. EPWs Pre-capture v. post-capture.
 - a. Pre-capture: GCM or federal or state court if they have jurisdiction over U.S. soldier for same offense (Art. 82, 85, GPW).⁸⁴
 - b. Post-capture: any level court-martial UP of Article 2(9), UCMJ (Art. 82, 102).
 - c. Courts-martial or military commission (Art. 84). [BUT note effect of Art. 102, GPW!]
 - 2. Detainees.
 - a. Military Commissions.⁸⁵

⁸⁴ See 10 U.S.C. §802(a)(9) and 18 U.S.C. §3227.

It should be noted that at least 12 nations have made a reservation to Art. 85, GPW. The reservation in essence would deny a P.O.W. their protected status if convicted of a war crime. North Vietnam used their reservation under Art. 85 to threaten on several occasions the trial of American pilots as war criminals. See MARJORIE WHITEMAN, 10 DIGEST OF INTERNATIONAL LAW 231 - 234 (1968); J. Burnham, *Hanoi's Special Weapons System: threatened execution of captured American pilots as war criminals*, NAT. REV., Aug. 9, 1966; *Dangerous decision: captured American airmen up for trial?*, NEWSWEEK, July 25, 1966; *Deplorable and repulsive: North Vietnam plan to prosecute captured U.S. pilots as war criminals*, TIME, July 29, 1966, at 12 - 13. See generally, Joseph Kelly, *PW's as War Criminals*, MIL. REV. (Jan. 1972), at 91.

⁸⁵ See Robinson O. Everett and Scott L. Silliman, *Forums For Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509 (1994).

- b. Local National Court.
- 3. Due process required.
 - a. POWs: same as detaining powers military forces (Art 99 - 108, GPW).
 - b. Detainees. What due process they receive depends upon status: GCC, common Art. 3, or minimal human rights protection with Host Nation law.
 - c. Right to appeal (Art 106, GPW).

XLVI. ESCAPE.

- A. When is an escape successful.⁸⁶ (Art. 91, GPW).
 - 1. SM has rejoined their, or an Allies, armed forces;
 - 2. SM has left the territory of the Detaining power or its ally; [entered a neutral country's territory]⁸⁷

⁸⁶ Between 1942 and 1946, 2,222 German P.O.W.s escaped from American camps in the U.S. At the time of repatriation, 28 still were at large. One remained at large and unaccounted for in the U.S. until 1995! None of the German P.O.W.s ever successfully escaped. During World War II, 435,788 German P.O.W.s were held on American soil (about 17 divisions worth). Of all the Germans captured by the British in Europe, only one successfully escaped and returned to his own forces. This German P.O.W. did this by jumping a prisoner train in Canada and crossing into the U.S., which at that time was still neutral. ALBERT BIDERMAN, *MARCH TO CALUMNY: THE STORY OF AMERICAN POW'S IN THE KOREAN WAR* 90 (1979) Jack Fincher, *By Convention, the enemy within never did without*, SMITHSONIAN (June 1995), at 127. See also ARNOLD KRAMMER, *NAZI PRISONERS OF WAR IN AMERICA* (1994).

See, A. Porter Sweet, *From Libby to Liberty*, MIL. REV. (Apr. 1971), at 63, for an interesting recount of how 109 union soldiers escaped a Confederate P.O.W. camp during the Civil War. See *ESCAPE AND EVASION: 17 TRUE STORIES OF DOWNED PILOTS WHO MADE IT BACK* (Jimmy Kilbourne, ed. 1973), for stories of servicemen who successfully avoided capture after being shot down behind enemy lines or those who successfully escaped P.O.W. camps after capture. The story covers World War I through the Vietnam War. According to this book, only 3 Air Force pilots successfully escaped from captivity in North Korea. Official Army records show that 670 soldiers captured managed to escape and return to Allied control. However, none of the successful escapees had escaped from permanent POW camps. See Paul Cole, *I POW/MIA Issues, The Korean War* 42 (Rand Corp. 1994). See also George Skoch, *Escape Hatch Found: Escaping from a POW camp in Italy was one thing. The next was living off a war-torn land among partisans, spies, Fascists and German Patrols*, MIL. HISTORY (Oct. 1988), at 34.

- B. Unsuccessful escape.
1. Only disciplinary punishment for the escape itself (Art. 92, GPW). *See also* Art. 120, GCC.
 2. Offenses in furtherance of escape.⁸⁸
 - a. Disciplinary punishment only: if sole intent is to facilitate escape and no violence to life or limb, or self-enrichment (Art. 93, GPW).
- For example, a POW may wear civilian clothing during escape attempt without losing their POW status.⁸⁹
 - b. Judicial punishment: if violence to life or limb or self-enrichment (Art. 93, GPW).
- C. Successful escape: Some authors argue no punishment can be imposed for escape or violence to life or limb offenses committed during escape if later recaptured (Art 91, GPW; Levie). However, most authors posit that judicial punishment can occur if a POW is later recaptured for their previous acts of violence.
- Issue still debated so U.S. policy is not to return successfully escaped POW to same theatre of operations (i.e. COL Rowe).
- D. Use of force, against P.O.W.s during an escape attempt or camp rebellion is lawful. Use of deadly force is authorized "only when there is no other means of putting an immediate stop to the attempt."⁹⁰

⁸⁷ *See* SWISS INTERNMENT OF PRISONERS OF WAR: AN EXPERIMENT IN INTERNATIONAL HUMANE LEGISLATION AND ADMINISTRATION (Samuel Lindsay, ed., 1917), for an account of POW internment procedures used during World War I.

⁸⁸ *But see* 18 U.S.C. § 757 which makes it a felony, punishable by 10 years confinement and \$10,000 to procure "the escape of any prisoner of war held by the United States or any of its allies, or the escape of any person apprehended or interned as an enemy alien by the United States or any of its allies, or . . . assists in such escape . . ., or attempts to commit or conspires to commit any of the above acts. . . ."

⁸⁹ *Rex v. Krebs* (Magistrate's Court of the County of Renfrew, Ontario, Canada), 780 CAN. C.C. 279 (1943). The accused was a German POW interned in Canada. He escaped and during his escape he broke into a cabin to get food, articles of civilian clothing, and a weapon. The court held that, since these acts were done in an attempt to facilitate his escape, he committed no crime.

⁹⁰ Pictet, at 246. *See also id.*, at 246-248. *Compare Trial of Albert Wagner*, XIII THE UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF THE TRIAL OF WAR CRIMINALS, Case No. 75, 118 (1949), with *Trial of Erich Weiss and Wilhelm Mundo*, XIII THE UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF THE TRIAL OF WAR CRIMINALS, Case No. 81, 149 (1949).

XLVII.REPATRIATION.⁹¹

- A. Sometimes required before cessation of hostilities (Art. 109, GPW).
 - 1. Seriously sick and wounded POWs whose recovery is expected to take more than 1 year (Art. 110, GPW).
 - 2. Incurable sick and wounded (Art. 110, GPW).
 - 3. Permanently disabled physically or mentally (Art. 110, GPW).
 - 4. Used in Korean War: 6640 NK & Chinese for 684 UN soldiers. Operation Little Switch.
 - 5. This provision is routinely ignored.
- B. After cessation of hostilities.
 - 1. Must it be done?
 - a. Art. 118 provides: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."
 - b. Rule followed through W.W.II.
 - **Result: thousands of Russian POWs executed by Stalin upon forced repatriation.**
 - c. U.N. command in Korea first established principle that POWs do not have to be repatriated, if they do not so wish.⁹² Logic supported by Pictet.
 - d. The experience in Vietnam.⁹³

Art. 42, GPW provides: "The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances."

⁹¹ For a thorough list of resources on this issue, see BIBLIOGRAPHY ON REPATRIATION OF PRISONERS OF WAR (1960), a copy of which is maintained by the TJAGSA Library.

⁹² See R.R. Baxter, *Asylum to Prisoners of War*, BRITISH YEARBOOK INT'L L. 489 (1953).

- e. Desert Storm experience.
- C. During a cease-fire or Armistice
 - 1. CW2 Hall incident⁹⁴
 - a. Probable basis for repatriation: Art. 118
 - b. Art. 117 provides: "No repatriated person may be employed on active military service."
- only applies to Art. 109,110 repatriations.
 - 2. Legally there is no problem going back to duty in S. Korea.⁹⁵ But does it make common sense?

XLVIII.CODE OF CONDUCT.

- A. The Air Force is the executive agent.
- B. The Joint Services SERE Agency (JSSA) implements the DoD Directive on Code of Conduct matters.
- C. History of U.S. POW misconduct.
 - 1. First American POW "turncoat" occurred in Revolutionary War. Later, he was convicted of treason. *Republica v. M'Carty*, 2 U.S. 86 (1781).
 - 2. U.S. War Dept G.O. 207 (1863) made it the duty of a soldier captured by the Confederates to escape.
- Union soldiers collaborated with Confederates forces in Andersonville to stop tunneling attempts.

⁹³ See Alfred Richeson, *The Four-Party Joint Military Commission*, MIL. REV. (Aug. 1973), at 16.

⁹⁴ See Scott R. Morris, *America's Most Recent Prisoner of War: The WO Bobby Hall Incident*, ARMY LAW., Sept. 1996, at 3.

⁹⁵ Or was there? See The Korean Armistice Agreement, para. 52, *reprinted in*, DA PAM. 27-1, at 210.

3. In W.W.II, prisoners collaborated. *U.S. v. Provoo*, 124 F. Supp. 185 (S.D.N.Y. 1954), *rev'd*, 215 F. Supp. 531 (2d Cir. 1954)(mistreatment of fellow POWs and making radio broadcasts for Japanese).
 4. During the Korean War, a conservative estimate is 30% of U.S. personnel collaborated to some degree with the enemy.⁹⁶
 5. President Eisenhower issued E.O. 10631 creating the modern day concept of the Code of Conduct in response to Korean War POW conduct.
 6. Between 1955 and 1979 DoD issued guidance on the code of conduct five times.⁹⁷
 7. Most recent change did not substantively change the Code of Conduct. It only made the Code gender neutral. (See E.O. 12633).
- D. Code of Conduct applies regardless of servicemember's "status" (i.e., OOTW).⁹⁸
- E. POW statements: Do they violate the code?
1. *USS PUEBLO* crew detained after being seized in international waters (physical torture)? No code violation.
 2. Did LT Zaun violate the code of conduct?⁹⁹ No

⁹⁶ The treatment of American P.O.W.s by the North Koreans was some of the worst conditions in history. Of the 6,656 Army soldiers taken prisoner during the war, only 3,323 were ultimately repatriated. Julius Segal, *FACTORS RELATED TO THE COLLABORATION AND RESISTANCE BEHAVIOR OF U.S. ARMY PW'S IN KOREA* 4 (Dec. 1956). *See Note: Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases*, 56 COL. L. REV 709 (1956), for a detailed factual and legal analysis of Korean POWs experiences.

⁹⁷ DoD issued guidance through Dep't of Def., Pamphlet 8-1, U.S. Fighting Man's Code first issued in November 1955 and revised three times. DoD also issued in July 1965, DoD Dir. 1300.7, Training and Education Measures Necessary to Support the Code of Conduct (July 8, 1964). However, this guidance left it to the individual services to develop, interpret, and train its servicemembers on the Code. This lead to interpretation problems by U.S. P.O.W.s in North Vietnam.

⁹⁸ Notice that the code applies to servicemembers. This can create a problem when civilians become prisoners of war. *See* Michael Kalapos, *A Discussion Of The Relationship Of Military And Civilian Contractor Personnel In The Event Members Of Both Groups Become Prisoners of War* (1987) (unpublished Executive Research Project, Industrial College of the Armed Forces), *available in* DTIC, ref. # AD-B115 978; James Clunan, *Civilian-Military Relations Among Prisoners of War in Southeast Asia: Applications Today* (1987)(unpublished Executive Research Project, Industrial College of the Armed Forces), *available in* DTIC, ref. # AD-B115 905.

3. Did WO Hall violate the code of conduct?¹⁰⁰
 - a. Official U.S. position: No
 - b. Why not? (no physical coercion)
 4. Key words are "resist" and "to the "utmost of my ability."
 5. Does a POW violate the Code if they write a letter to their family? No. It's not in response to questioning.
 6. "Confessions" to war crimes may result in loss of POW status if later tried. See reservations to Art. 85, GPW in Pictet, at 423 - 427.
- F. Is Art. III of the Code of Conduct inconsistent with POW status?¹⁰¹
1. No, even during escape attempt, once POW is outside detaining powers immediate control, POW retains status but detaining power can use all necessary means to prevent his successful escape, including deadly force (Art. 5 & 42, GPW).
 2. Retained personnel exception: the requirement to escape does not apply to doctors/chaplains.
 3. SRO can authorize temporary parole to perform acts which will materially contribute to the welfare of the prisoner or fellow prisoner (FM 27-10, para. 187b).
- G. Can it be punitive?
1. Moral code, not a legal code.¹⁰²

⁹⁹ See APPENDIX A. See also J. Jennings Moss, *Iraq tortured all Americans captured*, WASH. TIMES, Aug. 2, 1991, at A1; Melissa Healy, *Pentagon Details Abuse of American POWs in Iraq; Gulf War: Broken Bones, Torture, Sexual Threats are Reported. It could spur further calls for War Crimes Trial*, L.A. TIMES, Aug. 2, 1991, at A1; and JOHN NORTON MOORE, CRISIS IN THE GULF: ENFORCING THE RULE OF LAW 70 - 75 (1994), for accounts of the abuse U.S. P.O.W.s were subjected to during the Gulf War.

¹⁰⁰ See Scott R. Morris, *America's Most Recent Prisoner of War: The WO Bobby Hall Incident*, ARMY LAW., Sept. 1996, at 3.

¹⁰¹ See generally, Elizabeth R. Smith, Jr., *The Code of Conduct in Relation to International Law*, 31 MIL. L. REV. 85 (1966).

2. But can be punitive by analogy under the UCMJ.
 - a. Disrespect/Disobey SRO;
 - b. Aiding the enemy;
 - c. Mutiny and sedition;
 - d. Cruelty and maltreatment; and,
 - e. Misconduct as a prisoner.¹⁰³
3. 14 former POWs were court-martialled after Korea.¹⁰⁴
4. Attempts were made after Vietnam to prosecute POWs but for "policy" reasons this did not occur.¹⁰⁵ Note the Garwood exception

¹⁰² See generally, Richard E. Porter, *The Code of Conduct: A Guide to Moral Responsibility*, 32 AIR. UNIV. REV. 107 (Jan. - Feb. 1983).

¹⁰³ See Charles L. Nichols, *Article 105, Misconduct as a Prisoner*, 11 JAG. L. REV. 393 (Fall 1969). During the Korean War, at least 24 American P.O.W.s informed on other P.O.W.s during escape attempts. "Twenty-two percent of returning PW's report being aware of outright mistreatment of prisoners by fellow prisoners -- including beatings resulting in death...." JULIUS SEGAL, *FACTORS RELATED TO THE COLLABORATION AND RESISTANCE BEHAVIOR OF U.S. ARMY PW'S IN KOREA* 33, 90 (Dec. 1956).

¹⁰⁴ See, e.g., *United States v. Floyd*, 18 C.M.R. 362 (A.B.M.R. 1954); *United States v. Dickenson*, 17 C.M.R. 438 (A.B.M.R. 1954), *aff'd* 20 C.M.R. 154 (C.M.A. 1955); *United States v. Batchelor*, 19 C.M.R. 452 (A.B.M.R. 1954). See also Edith Gardner, *Coerced Confessions of Prisoners of War*, 24 GEO. WASH. L. REV. 528 (1956). Eleven of the fourteen were ultimately convicted.

¹⁰⁵ There are four reasons presented by DoD to explain why collaborators were not prosecuted after Vietnam.

1. The Debriefers were instructed not to actively seek accusations because the emphasis was on gathering intelligence from the P.O.W.s
2. The Secretary of Defense had made a public statement saying no P.O.W.s who made propaganda statements would be prosecuted.
3. The service TJAGs said public opinion made convictions unlikely for P.O.W.s, who had already served extended periods of captivity in inhumane conditions.
4. The wording in the Manual for Courts-Martial implied that a member of one service component did not have to obey orders of superiors of a different component. [The MCM was amended on 3 Nov. 77 to correct this.]

- H. Code of Conduct training as part of LOW training.

"The most consistent unsolicited statement made by Southeast Asia Prisoners of War concern the need for improved and uniform training so that future prisoners would all be working together from the same and the best ground rules."¹⁰⁶

1. Should JAs be teaching this? Why not, if no SERE program.
 - a. JAs are no less qualified than any other non-SERE graduate.
 - b. JAs can combine and distinguish between the legal and moral obligations.
 - c. Code of Conduct instruction meshes well with other P.O.W. classes we already teach.
2. **"John Wayne doesn't appear at P.O.W. camps."**¹⁰⁷
3. Bounce back theory (developed by a SRO while in the "Hanoi Hilton").
 - a. resist as long as possible. The factors that effect a POWs ability to resist are:
 - (1) Shock of captivity;
 - (2) Wounds or illness;
 - (3) Malnutrition; and,

See The Code of Conduct: A Second Look (U.S. Air Force Productions, 198_) [archive ref.# AFL 095-034-045, Pin #51190]. *See generally*, *Miller v. Lefman*, 801 F.2d 492 (D.C. Cir. 1986). LtCol Miller, U.S.M.C. was a P.O.W. that the SRO preferred charges against after the war.

¹⁰⁶ The Code of Conduct: a Second Look (U.S. Air Force Productions, 198_)

¹⁰⁷ Experiences of a P.O.W. (TJAGSA Productions, Sept. 1985). This two hour videotape captures the incites of COL Nick Rowe. COL Rowe was captured by the North Vietnamese in 1964. He spent 5 1/2 years as a P.O.W. until he successfully escaped. COL Rowe's experiences and advice were instrumental in developing SERE training. Tragically, COL Rowe was assassinated in the Philippines in December 1989.

- (4) Exploitation by captors. For example, the North Vietnamese prison guards would tell U.S. P.O.W.s of their obligations under the Code of Conduct.¹⁰⁸
 - (5) Disease used as a means to influence.
 - b. if break, give as little as possible. COL Rowe identifies three levels of information:
 - (1) Information they already possess or could easily acquire from other readily available sources.
 - (2) Information whose value diminishes over time (perishable).
 - (3) Information where you “bite the bullet.”¹⁰⁹
 - (4) “I don’t know” is the hardest answer for an interrogator to break.
 - (5) Humor is the greatest weapon - Americans laugh when they get hurt.
 - c. regroup and begin to resist again.
 - d. don't be overwhelmed with guilt.
- 4. SERE: COL Nick Rowe experience.
- 5. SRO is the commander regardless of service branch.¹¹⁰

¹⁰⁸ Experiences of a P.O.W. (TJAGSA Productions, Sept. 1985).

¹⁰⁹ Experiences of a P.O.W. (TJAGSA Productions, Sept. 1985).

¹¹⁰ See Donald L. Manes, Jr., *Barbed Wire Command: The Legal Nature of the Command Responsibilities of the Senior Prisoner in a Prisoner of War Camp*, 10 MIL. L. REV. 1 (1960), and John R. Brancato, *Doctrinal Deficiencies in Prisoner of War Command*, AIRPOWER J. (Spr. 1988), at 40, for some of the problems the SRO faces during captivity.

6. By E.O. 12018, retained personnel cannot be SROs. Being an SRO would be inconsistent with their retained status.

7. Box 25 - used by Vietnam POWs (modified Morse Code).¹¹¹

A	B	C	D	E
F	G	H	I	J
L	M	N	O	P
Q	R	S	T	U
V	W	X	Y	Z

¹¹¹ See Bobby D. Wagnor, *Communication: the key element to prisoners of war survival*, 23 AIR. UNIV. REV. 33 (May - June 1976).

APPENDICES

- A. Excerpt from the DoD FINAL REPORT TO CONGRESS ON THE GULF WAR.**
- B. CHAIRMAN, JOINT CHIEFS OF STAFF INSTRUCTION 3290.01, PROGRAM FOR ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES, AND OTHER DETAINED PERSONNEL (20 March 1996).**
- C. *U.S. v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992).**
- D. Scott R. Morris, *Americas Most Recent Prisoner of War: The Warrant Officer Bobby Hall Incident*, ARMY LAW., Sept. 1996, at 3.**
- E. Western Union Telegrams to Mr. & Mrs. Dewey L. Sims, dated 4 August 1944 and 2 June 1945.**
- F. U.S. CENTRAL COMMAND, REGULATION 27-13, LEGAL SERVICES - CAPTURED PERSONS: DETERMINATION OF ELIGIBILITY FOR ENEMY PRISONER OF WAR STATUS (7 Feb. 1995).**

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THE LAW OF WAR
METHODS AND MEANS OF WARFARE

REFERENCES

1. Hague Convention No. IV, 18 October 1907, Respecting the Laws and Customs of War on Land, T.S. 539, including the regulations thereto [hereinafter H. IV].
2. Hague Convention No. IX, 18 October 1907, Concerning Bombardment by Naval Forces in Time of War, 36 Stat. 2314 [hereinafter H. IX].
3. Geneva Convention, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31 [hereinafter GWS].
4. Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members, August 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.S.T.S. 85 [hereinafter GWS Sea].
5. Geneva Convention, Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135 [hereinafter GPW].
6. Geneva Convention, Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287 [hereinafter GC].
7. The 1977 Protocols Additional to the Geneva Conventions, December 12, 1977, 16 I.L.M. 1391, DA Pam 27-1-1 [hereinafter GP I & II].
8. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter 1925 Geneva Protocol].
9. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, January 13, 1993, 32 I.L.M. 800 [hereinafter 1993 CWC].
10. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216 [hereinafter 1954 Cultural Property Convention].
11. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, April 10, 1972, 26 U.S.T. 583 [hereinafter 1972 Biological Weapons Convention].
12. Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, October 10, 1980, 19 I.L.M. 1523 [hereinafter 1980 Conventional Weapons Treaty].
13. Dep't of the Army, Field Manual 27-10, The Law of Land Warfare (July 1956) [hereinafter FM 27-10].
14. Dep't of the Navy, Naval Warfare Publication 1-14M/U.S. Marine Corps MCPW 5-2.1, The Commander's Handbook on the Law of Naval Operations (October 1995) [hereinafter NWP 1-14M].
15. Dep't of the Air Force, Air Force Publication 110-31, International Law--The Conduct of Armed Conflict and Air Operations (19 November 1976) [hereinafter AFP 110-31].

16. Dep't of Defense Instruction 5000.1, Defense Acquisition (15 March 1996)
[hereinafter DoD Instr. 5000.1].

XLIX.LEGAL FRAMEWORK.

- A. The Law of the Hague (ref. (1) and (2)). Regulates "methods and means" of warfare -- prohibitions against using certain weapons such as poison and humanitarian concerns such as warning the civilian population before a bombardment. The rules relating to the methods and means of warfare are primarily derived from articles 22 through 41 of the Regulations Respecting the Laws and Customs of War on Land [hereinafter HR] annexed to Hague Convention IV. (HR, art. 22-41.) Article 2 states that the means of injuring the enemy are not unlimited.
- B. Geneva Conventions of 1949 (ref. (3) - (6)). Protects "victims" of war such as wounded and sick, shipwrecked at sea, prisoners of war, and civilians.
- C. 1977 Geneva Protocols (ref. (7)). The US has not ratified these treaties. Portions, however, do reflect state practice and legal obligations -- the key ingredients to customary international law.
 - 1. Motivated by International Committee of the Red Cross' belief that the four Geneva Conventions and the Hague Regulations insufficiently covered certain areas of warfare in the conflicts following WWII, specifically aerial bombardments, protection of civilians, and wars of national liberation.
 - 2. New or expanded areas of definition and protection contained in Protocols include provisions for: medical aircraft, wounded and sick, prisoners of war, protections of the natural environment, works and installations containing dangerous forces, journalists, protections of civilians from indiscriminate attack, and legal review of weapons.

3. US views these GP I articles as either customary international law or acceptable practice though not legally binding: 5(appointment of protecting powers);10(equal protection of wounded, sick, and shipwrecked);11(guidelines for medical procedures); 12-34(medical units, aircraft, ships, missing and dead persons);35(1)(2)(limiting methods and means of warfare);37(perfidy prohibitions);38(prohibition against improper use of protected emblems); 45(prisoner of war presumption for those who participate in the hostilities); 51(protection of the civilian population, except para. 6 -- reprisals);52(general protection of civilian objects);54(protection of objects indispensable to the survival of the civilian population);57-60(precautions in attack, undefended localities, and demilitarized zones);62(civil defense protection);63(civil defense in occupied territories);70(relief actions);73-89(treatment of persons in the power of a party to the conflict; women and children; and duties regarding implementation of GPI).
4. The US specifically objects to articles 1(4)(GPI applicability to certain types of armed conflicts);35(3)(environmental limitations on means and methods of warfare);39(2)(use of enemy flags and insignia while engaging in attacks); 44(combatants and prisoners of war (portions));47(non-protection of mercenaries);55(protection of the natural environment) and 56(protection of works and installations containing dangerous forces). *See* Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. Int'l & Pol'y 419, 420 (1987).

D. Treaties. The following treaties that limit specific aspects of warfare are another source of targeting guidance.

1. Gas (ref. (8) and (9)). Geneva Protocol of 1925 prohibits use in war of asphyxiating, poisonous, or other gases US reserves right to respond with chemical weapons to a chemical attack by other side. But cf. Chemical Weapons Convention (CWC), article I(1), which prohibits production, stockpiling, and use (even in retaliation). The U.S. ratified the CWC, April 1997.
2. Cultural Property (ref. (10)). The 1954 Hague Cultural Property Convention prohibits targeting cultural property, and sets forth conditions when cultural property may be used by a defender or attacked.

3. Biological Weapons (ref (11)). Biological weapons are prohibited by the 1925 Geneva Protocol. However, their use in retaliation, as well as prohibitions on production, manufacture, and stockpiling is prohibited by the 1972 Biological Weapons Convention.
 4. Conventional Weapons (ref. (12)). The 1980 Conventional Weapons Treaty restricts or prohibits the use of certain weapons deemed to cause unnecessary suffering or to be indiscriminate: Protocol I - nondetectable fragments; Protocol II - mines, booby traps and other devices; Protocol III - incendiaries; and Protocol IV- laser weapons. The U.S. has ratified the treaty by ratifying Protocols I and II. The Senate is currently reviewing Protocols III and IV and amendments to Protocol II for its advice and consent to ratification. The treaty is often referred to as the UNCCW - United Nations Convention on Certain Conventional Weapons.
- E. Regulations. Implementing targeting guidance for US Armed Forces is found in respective service regulations. (FM 27-10 (Army), NWP 1-14M/FMFM 1-10 (Navy and Marine Corps), and AFP 110-31 (Air Force).)

L. PRINCIPLES

A. The Principles:

Military Necessity: targeting not prohibited by LOW and of a military advantage. Military Objective: persons, places, or objects that make an effective contribution to military action.

Humanity or Unnecessary Suffering: minimize unnecessary suffering - incidental injury to people and collateral damage to property.

Proportionality: loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.

Discrimination or Distinction: Discriminate or distinguish between combatants and non-combatants; military objectives and protected people/protected places.

- B. Principle of Military Necessity - That principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. (FM 27-10, para. 3.)

1. "Not forbidden." Targeting of enemy personnel and property permitted unless otherwise prohibited by international law. This check on the application of military force, i.e., international law, is the distinction cited by Dr. Lieber in 1863. This differed from the 19th Century European view as stated below by Germany's Bismarck:

Humanitarian claims such as the protection of men and goods can only be taken into consideration insofar as the nature of war permits." See Dep't of the Army, *International Law*, Dep't of the Army Pamphlet 27-161-2, 12 (1962) [hereinafter DA Pam. 27-161-2].

2. Indispensable for complete submission. In a limited war, the act must be indispensable to attain the limited objective. For example, in the Persian Gulf War, the UN mandate limited the coalition's objective to forcing Iraq from Kuwait. This objective did not require the complete submission of all Iraq forces.
3. Criminal Defense. Military Necessity has been argued as a defense to law of war violations and has generally been rejected as a defense for acts forbidden by customary and conventional laws of war. Rationale: laws of war were crafted to include consideration of military necessity. Approach - look to whether international law allows targeting of a person or property. Examples:
 - a. Protected Persons. Law generally prohibits the intentional targeting of protected persons under any circumstances. WWII Germans, under concept called "Kriegsraison," argued that sometimes dire military circumstances allowed them to violate international law -- i.e., kill prisoners at Malmedy because they had no provisions for them and their retention would have jeopardized their attack. (Rejected as a valid defense.)

- b. Protected Places - The Rendulic Rule. Law typically allows destruction of civilian property, if military circumstances require such destruction. (FM 27-10, para. 56 and 58.) The circumstances requiring destruction of protected property are those of "urgent military necessity" as they appear to the commander at the time of the decision. See IX Nuremberg Military Tribunals, *Trials of War Criminals Before the Nuremberg Military Tribunals*, 1113 (1950). Charges that General Lothar Rendulic unlawfully destroyed civilian property via a "scorched earth" policy were dismissed by the Tribunal because "the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made." Id. Current norms for protection (and destruction) of civilian property:

- (1) [Don't destroy real or personal property of civilians] "except where such destruction is rendered absolutely necessary by military operations. (GC, art. 53.)
- (2) "[F]orbidden . . . to destroy or seize the enemy's property . . . unless demanded by the necessities of war." (HR, art. 23g.)

C. Principle of Unnecessary Suffering or Humanity - "It is especially forbidden . . . to employ arms, projectiles or material calculated to cause unnecessary suffering." (HR, art. 23e.) This concept also extends to unnecessary destruction of property.

1. Can't use arms that are per se calculated to cause unnecessary suffering (e.g., projectiles filled with glass, irregular shaped bullets, dum-dum rounds, lances with barbed heads).
2. Can't use otherwise lawful arms in a manner that causes unnecessary suffering (e.g., 2000 pound bomb instead of precision guided munition against a military objective where civilians are nearby, used with the intent to cause civilian suffering).

D. Principle of Proportionality

1. The Test. The loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. (FM 27-10, para. 41, change 1.)
2. Protocol I. Under GP I, Article 51 (*Protection of the civilian population*), paragraph 5(b) prohibits “indiscriminate attacks”, defined in part as an attack where incidental injury to civilians or incidental damage to civilian objects would be “excessive in relation to the concrete and direct military advantage anticipated.” Under GP I, Article 57 (*Precautions in the attack*), paragraph (2)(b) requires planners to cancel an attack in the same circumstances. The U.S. considers these provisions customary international law.
3. Incidental Injury and Collateral Damage. Unavoidable and unplanned damage to civilian personnel and property incurred while attacking a military objective. Incidental (a/k/a collateral) damage is not a violation of international law. While no law of war treaty defines this concept, its inherent lawfulness is implicit in treaties referencing the concept. As stated above, GP I, Article 51(5) describes indiscriminate attacks as those causing “incidental loss of civilian life . . . excessive . . . to . . . the military advantage anticipated.” Id. Caution, however, the law of proportionality still applies.
4. Judging Commanders. It may be a grave breach of GP I to launch an attack that a commander *knows* will cause excessive incidental damage in relation to the military advantage gained. The requirement is for a commander to act *reasonably*.
 - a. Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places . . . but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated. (FM 27-10, para. 41.)

- b. In judging a commanders actions one must look at the situation as the commander saw it in light of all circumstances. *See* A.P.V. Rogers, *Law on the Battlefield* 66 (1996) and discussion of the “Rendulic Rule”, above, at para. B,3. But based on case law and modern applications, the test is not entirely subjective -- “reasonableness” seems to have an objectivity element as well. In this regard, two questions seem relevant. Did the commander reasonably gather information to determine whether the target was a military objective and that the incidental damage would not be disproportionate? Second, did the commander act reasonably based on the gathered information? Of course, factors such as time, available staff, and combat conditions affecting the commander must also factor into the analysis.
- c. Example: Al Firdus Bunker. During the Persian Gulf War, planners identified this bunker as a military objective. Barbed wire surrounding the complex, it was camouflaged, and armed sentries guarded its entrance and exit points. Unknown to coalition planners, however, Iraqi civilians used the shelter as nighttime sleeping quarters. The complex was bombed, resulting in 300 civilian casualties. Was there a violation of the law of war? No. Based on information gathered by coalition planners, the commander made a reasonable assessment that the target was a military objective and that incidental damage would not outweigh the military advantage gained. Although the attack unfortunately resulted in numerous civilian deaths, (and that in hindsight, the attack might have been disproportionate to the military advantage gained -- had the attackers known of the civilians) there was no international law violation because the attackers, at the time of the attack, acted reasonably. *See* DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR, FINAL REPORT TO CONGRESS 615-616 (1992).

E. Principle of Discrimination or Distinction. GP I prohibits “indiscriminate attacks.” Under Article 51, paragraph 4, these are attacks that:

- a. are “not directed against a specific military objective”, (e.g., SCUD missiles during Persian Gulf War);

- b. “employ a method or means of combat the effects of which cannot be directed at a specified military objective”, [e.g., might prohibit area bombing in certain populous areas, such as a bombardment “which treats as a single military objective a number of clearly separated and distinct military objectives in a city, town, or village...”](GP I, art. 51, para. 5(a)); or
- c. “employ a method or means of combat the effects of which cannot be limited as required” by the protocol (e.g., release of dangerous forces - GP I, art. 56 or incidental effect excessive in relation to concrete and direct military advantage - GP I, art. 51, para.5(b); and
- d. “consequently, in each case are of a nature to strike military objectives and civilians or civilian objects without distinction.” (*See*, A.P.V. Rodgers, *Law on the Battlefield*, 19-24 (1996).)

LI. TARGETS

A. Military Objectives. (FM 27-10, para. 40, and GP I, art. 52(2).) Combatants, defended places, and those objects which by their nature, location, purpose or use make an effective contribution to military action.

B. PERSONS

1. Combatants. Anyone engaging in hostilities in an armed conflict on behalf of a party to the conflict. Combatants are lawful targets unless "out of combat"

a. Lawful Combatants. Receive protections of Geneva Conventions, specifically, the GWS, GWS Sea, and GPW.

b. Geneva Convention Definition. (GPW, art. 4; GWS, art. 13.)

(1) Under Responsible Command,

- (2) Distinctive Sign Recognizable at a Distance,
 - (3) Carry Arms Openly, and
 - (4) Abide by the Laws of War.
 - c. Protocol I Definition. Article 44(3) of GP I requires that a belligerent attains combatant status by merely carrying his arms openly during each military engagement, and when visible to an adversary while deploying for an attack. GP I thus drops the requirement for a fixed recognizable sign. The U.S. believes this does not reflect customary international law and diminishes the distinction between combatants and civilians, thus undercutting the effectiveness of humanitarian law.
 - d. Unlawful combatants. May be treated as criminals under the domestic law of the captor. An unlawful combatant can be a civilian who is participating in the hostilities or a member of the armed forces who violates the laws of war.
2. Noncombatants. The laws of war prohibits attacks on non-combatants.
- a. Civilians
 - (1) General Rule. Civilians and civilian property may not be the subject or sole object of a military attack. Civilians are persons who are not members of the enemy's armed forces; and who do not take part in the hostilities (GP I, art. 50 and 51).
 - (2) Indiscriminate Attacks. GP I provides for expanded protections of the civilian population from "indiscriminate" attacks. Indiscriminate attacks include those where the incidental loss of civilian life, or damage to civilian objects, would be excessive in relation to the concrete and direct military advantage anticipated. (GP I, art. 51 - except for para. 6, considered customary international law by US.)

- (3) Warning Requirement. (FM 27-10, para. 43,; see HR, art. 26.) General requirement to warn before a bombardment. Only applies if civilians are present. **Exception:** if it is an assault (any surprise attack or an attack where surprise is a key element). GP I, Article 57(2)(c), however, requires warning of civilians before an attack (not necessarily a bombardment), unless circumstances do not permit (this is considered customary international law by the US).

b. Hors de Combat. Prohibition against attacking enemy personnel who are "out of combat." Protected persons:

- (1) Prisoners of War. (GPW, art. 4, HR, art. 23c,d.)
- (a) Surrender may be made by any means that communicates the intent to give up. No clear cut rule as to what constitutes a surrender. However, most agree surrender constitutes a cessation of resistance and placement of one's self at the discretion of the captor.
 - (b) Onus on person or force surrendering to communicate intent to surrender.
 - (c) Captors must respect (not attack) and protect (care for) those who surrender--no reprisals.
 - (d) Protocol I. Expands definition of prisoners of war to include "combatants." Combatants include those that don't distinguish themselves from the civilian population except when carrying arms openly during an engagement and in the deployment immediately preceding the engagement; e.g., national liberation movements. (GP I, art. 44.) U.S. asserts this definition does not reflect customary international law.

- (2) Wounded and Sick in the Field and at Sea. (GWS, art. 12; GWS Sea, art. 12.) Those soldiers who have fallen by reason of sickness or wounds and who ceases to fight are to be respected and protected. Civilians are included in definition of wounded and sick (who because of trauma, disease, . . . are in need of medical assistance and care and who refrain from any act of hostility). (GP I, art. 8.) Shipwrecked members of the armed forces at sea are to be respected and protected. (GWS Sea, art. 12, NWP 1-14M, para. 11.6). Shipwrecked includes downed passengers/crews on aircraft, ships in peril, castaways.
 - (3) Parachutists (FM 27-10, supra, para. 30). Paratroopers are presumed to be on a military mission and therefore may be targeted. Parachutists who are crewmen of a disabled aircraft are presumed to be out of combat and may not be targeted unless it's apparent they are engaged on a hostile mission. Parachutists, according to GP I, Article 42, "shall be given the opportunity to surrender before being made the object of attack."
- c. Medical Personnel. Considered out of combat if they exclusively engaged in medical duties. (GWS, art. 24.) They may not be directly attacked, however, accidental killing or wounding of such personnel due to their proximity to military objectives "gives no just cause for complaint" (FM 27-10, para 225). Medical personnel include:
 - (1) Medical personnel of the armed forces. (GWS, art. 24.)
 - (a) Doctors, surgeons, nurses, chemists, stretcher bearers, medics, corpsman, and orderlies, etc., who are "exclusively engaged" in the direct care of the wounded and sick.
 - (b) Administrative staffs of medical units (drivers, generator operators, cooks, etc.).
 - (c) Chaplains.

- (2) Auxiliary Medical Personnel of the Armed Forces. (GWS, art. 25) To gain the GWS protection, they have received "special training" and be carrying out their medical duties when they come in contact with the enemy.
 - (3) Relief Societies. Personnel of National Red Cross Societies and other recognized relief Societies (GWS, art. 26). Personnel of relief societies of Neutral Countries (GWS, art. 27).
 - (4) Civilian Medical and Religious Personnel. Article 15 of GP I requires that civilian medical and religious personnel shall be respected and protected. They receive the benefits of the provisions of the Geneva Conventions and the Protocols concerning the protection and identification of medical personnel. All available help shall be given to civilian medical personnel when civilian services are disrupted due to combat.
- d. Personnel Engaged in the Protection of Cultural Property. Article 17 of the 1954 Hague Cultural Property Convention established a duty to respect (not directly attack) persons engaged in the protection of cultural property. The regulations attached to the convention provide for specific positions as cultural protectors and for their identification.
 - e. Journalists. Given protection as "civilians" provided they take no action adversely affecting their status as civilians. (GP I, art. 79 - considered customary international law by US).

C. PLACES

- 1. Defended Places. (FM 27-10, paras. 39 & 40, change 1.) As a general rule, any place the enemy chooses to defend makes it subject to attack. Defended places include:
 - a. a fort or fortified place;

- b. a place occupied by a combatant force or through which a force is passing; and
 - c. a city or town that is surrounded by defensive positions under circumstances that the city or town is indivisible from the defensive positions. See also, GP I, Article 51(5)(a), which seems to clarify this rule. Specifically, it prohibits bombardments which treat "as a single military objective a number of clearly separated and distinct military objectives located in a city, town, or village. . . ."
- 2. Undefended places. The attack or bombardment of towns, villages, dwellings, or buildings which are undefended is prohibited. (HR, art. 25.) An inhabited place may be declared an undefended place (and open for occupation) if the following criteria are met:
 - a. all combatants and mobile military equipment are removed;
 - b. no hostile use made of fixed military installations or establishments;
 - c. no acts of hostilities shall be committed by the authorities or by the population; and
 - d. no activities in support of military operations shall be undertaken (presence of enemy medical units, enemy sick and wounded, and enemy police forces are allowed. (FM 27-10, art. 39b, change 1.)
- 3. Natural environment. The environment cannot be the object of reprisals. In the course of normal military operations, care must be taken to protect the natural environment against long-term, widespread, and severe damage. (GP I, art. 55 - U.S. specifically objects to this article.)

4. Protected Areas. Hospital or safety zones may be established for the protection of the wounded and sick or civilians. (FM 27-10, para. 45.) Articles 8 and 11 of the 1954 Hague Cultural Property Convention provide that certain cultural sites may be designated in an “International Register of Cultural Property under Special Protections.” The Vatican and art storage areas in Europe have been designated under the convention as “specially protected.” The U.S. asserts the special protection regime does not reflect customary international law.

D. PROPERTY

1. Military Objective. Objects--if their nature, use, location, or purpose makes an effective contribution to military action. (FM 27-10, para. 40, GP I, art. 52(2).) The destruction, capture or neutralization must offer a definite military advantage. There must be a nexus between the object and a "definite" advantage toward military operations. Examples: munitions factory, bridges, railroads.
2. Protected Property
 - a. Civilians. Prohibition against attacking civilians or civilian property. (FM 27-10, para. 246; GP I, art. 51(2).) Presumption of civilian property attaches to objects traditionally associated with civilian use (dwellings, school, etc.) (GP I, art. 52(3).)
 - b. Protection of Medical Units and Establishments - Hospitals.(FM 27-10, paras. 257 and 258; GWS art. 19).
 - (1) Fixed or mobile medical units shall be respected and protected. They shall not be intentionally attacked.
 - (2) Protection shall not cease, unless they are used to commit “acts harmful to the enemy.”
 - (a) Warning requirement before attacking a hospital that is committing "acts harmful to the enemy."

- (b) Reasonable time to comply with warning, before attack.
- (3) When receiving fire from a hospital, there is no duty to warn before returning fire in self-defense. Example: Richmond Hills Hospital, Grenada.
- (4) Captured medical facilities and supplies of the armed forces. (FM 27-10, para. 234).
 - (a) Fixed facilities. May be used by captors, in cases of urgent military necessity, provided proper arrangements are made for the wounded and sick who are present.
 - (b) Mobile facilities. Captors may keep mobile medical facilities, provided they reserved for care of the wounded and sick.
 - (c) Medical Supplies. May not be destroyed.
- c. Medical Transport. Transports of the wounded and sick or of medical equipment shall not be attacked. (GWS, art. 35.) Under the Geneva Conventions of 1949, medical aircraft were protected from direct attack only if they flew in accordance with a previous agreement between the parties as to their route, time, and altitude. GP I extends further protection to medical aircraft flying over areas controlled by friendly forces. Under this regime, identified medical aircraft are to be respected, regardless of whether a prior agreement between the parties exist. (GP I, art. 25.) In “contact zones”, protection can only be effective by prior agreement; nevertheless medical aircraft “shall be respected after they have been recognized as such.” (GP I, art. 26 - considered customary international law by US.) Medical aircraft in areas controlled by an adverse party must have a prior agreement in order to gain protection. (GP I, art. 27.)

d. Cultural Property. Prohibition against attacking cultural property. The 1954 Cultural Property Convention elaborates, but does not expand, the protections accorded cultural property found in other treaties (HR, art. 27; FM 27-10, para. 45, 57.) The convention has not been ratified by the US (treaty is currently under review with a view toward ratification with minor understandings). (*See* GP I, art. 53, for similar prohibitions.) Cultural property includes buildings dedicated to religion, art, science, charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected.

(1) Misuse will subject them to attack.

(2) Enemy has duty to indicate presence of such buildings with visible and distinctive signs.

3. Works and Installations Containing Dangerous Forces. (GP I, art. 56, and GP II, art. 15.) The rules are not U.S. law but should be considered because of the pervasive international acceptance of GP I and II. Under the protocols dams, dikes, and nuclear electrical generating stations shall not be attacked - even if they are military objectives - if the attack will cause the release of dangerous forces and cause “severe losses” among the civilian population. (U.S. objects to “severe loss” language as creating a different standard than customary proportionality test - “excessive” incidental injury or damage.)

a. Military objectives that are nearby these potentially dangerous forces are also immune from attack if the attack may cause release of the forces (parties also have a duty to avoid locating military objectives near such locations).

b. May attack works and installations containing dangerous forces only if they provide “significant and direct support” to military operations and attack is the only feasible way to terminate the support. The U.S. objects to this provision as creating a standard that differs from the customary definition of a military objective as an object that makes “an effective contribution to military action.”

- c. Parties may construct defensive weapons systems to protect works and installations containing dangerous forces. These weapons systems may not be attacked unless they are used for purposes other than protecting the installation.
 - 4. Objects Indispensable to the Survival of the Civilian Population. Article 54 of GP I prohibits starvation as a method of warfare. It is prohibited to attack, destroy, remove, or render useless objects indispensable for survival of the civilian population - such as foodstuffs, crops, livestock, water installations, and irrigation works.
- E. Protective Emblems (FM 27-10, para. 238.) Objects and personnel displaying emblems are presumed to be protected under Conventions. (GWS, art. 38.)
- 1. Medical and Religious Emblems
 - a. Red Cross.
 - b. Red Crescent.
 - c. Lion and Sun.
 - d. Red Star of David: Not mentioned in the 1949 Geneva Convention, but is protected as a matter of practice.
 - 2. Cultural Property Emblems
 - a. "A shield, consisting of a royal blue square, one of the angles of which forms the point of the shield and of a royal blue triangle above the square, the space on either side being taken up by a white triangle." (1954 Cultural Property Convention, art. 16 and 17).
 - b. Hague Convention No. IX Concerning Bombardment by Naval Forces in Time of War (art. 5). "[L]arge, stiff, rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white."

3. Works and Installations Containing Dangerous Forces. Three bright orange circles, of similar size, placed on the same axis, the distance between each circle being one radius. (GP I, annex I, art. 16.)

LII. WEAPONS

- A. “The rights of belligerents to adopt means of injuring the enemy is not unlimited.” (HR, art. 22.)
- B. Legal Review. All U.S. weapons and weapons systems must be reviewed by the service TJAG for legality under the law of war. (DoD Instr. 5000.1, AR 27-53, and SECNAVINST 5711.8A.) A review occurs before the award of the engineering and manufacturing development contract and again before the award of the initial production contract. (DoD Instr. 5000.1, para. 2j.) Legal review of new weapons required also under Article 36 of GP I.
 1. The Test. Is the acquisition and procurement of the weapon consistent with all applicable treaties, customary international law, and the law of armed conflict? (DoD Instr. 5000.1, para. 2j.) In the TJAG reviews, the discussion will often focus on whether the suffering occasioned by the use of the weapon needless, superfluous, or grossly disproportionate to the advantage gained by its use?
 2. Weapons may be illegal:
 - a. Per se. Those weapons calculated to cause unnecessary suffering, determined by the “usage of states.” Examples: lances with barbed heads, irregular shaped bullets, projectiles filled with glass. (FM 27-10, para. 34.)
 - b. By improper use. Using an otherwise legal weapon in a manner to cause unnecessary suffering. Example: a conventional air strike against a military objective where civilians are nearby vs. use of a more precise targeting method that is equally available - if choice is made with intent to cause unnecessary suffering.

- c. By agreement or prohibited by specific treaties. Example: certain landmines, booby traps, and laser weapons are prohibited under the Protocols to the 1980 Conventional Weapons Treaty.
- C. Small Arms Projectiles. Must not be exploding or expanding projectiles. The Declaration of St. Petersburg of 1868 prohibits exploding rounds of less than 400 grams (14 ounces). Prohibited by late 19th century treaties (of which US was never a party). US practice, however, accedes to this prohibition as being customary international law. State practice is to use jacketed small arms ammunition (which reduces bullet expansion on impact).
 - 1. Hollow point ammunition. Typically, this is semi-jacketed ammunition that is designed to expand dramatically upon impact. This ammunition is prohibited for use in armed conflict by customary international and the treaties mentioned above. There are situations, however, where use of this ammunition is lawful because its use will significantly reduce collateral damage to noncombatants and protected property (hostage rescue, aircraft security).
 - 2. High Velocity Small Caliber Arms
 - a. Early controversy about M-16 causing unnecessary suffering.
 - b. "Matchking" ammunition. Has a hollow tip--but is not expansive on impact. Tip is designed to enhance accuracy only and does not cause unnecessary suffering.
 - 3. Sniper rifles, .50 caliber machine guns, and shotguns. Much "mythology" exists about the lawfulness of these weapon systems. Bottom line: they are lawful weapons, although rules of engagement (policy and tactics) may limit their use.
- D. Fragmentation (FM 27-10, para 34.)
 - 1. Legal unless used in an illegal manner (on a protected target or in a manner calculated to cause unnecessary suffering).

2. Unlawful if fragments are undetectable by X-ray (Protocol I, 1980 Conventional Weapons Treaty).

E. Landmines and Booby Traps. Lawful if properly used, however, international process underway to outlaw all antipersonnel land mines.

1. Indiscriminate. Primary legal concern: indiscriminate use which endangers civilian population. Articles 4 and 5, Protocol II of the 1980 Conventional Weapons Treaty restricts placement of mines and booby traps in areas of "civilian concentration."
 - a. Remotely delivered mines (those planted by air, artillery etc.). Only used against military objectives; and then so only if their location can be accurately recorded or if they are self-neutralizing.
 - b. Non-remotely delivered mines, booby traps, and other devices. Can't be used in towns or cities or other places where concentrations of civilians are present, unless:
 - (1) they are placed in the vicinity of a military objective under the control of an adverse party; or
 - (2) measures are in place to protect civilians from their effects (posting of signs etc.).
2. Booby Traps. Protocol II of the 1980 Conventional Weapons Treaty also prohibits use of booby traps on the dead, wounded, children's toys, medical supplies, and religious objects (art. 6).

3. Amended Protocol II (Mines Protocol). The President transmitted the ratification package on amended Protocol II, to the Senate on 7 January 1997. (1) Expands the scope of the original Protocol to include internal armed conflicts. (2) Requires that all remotely delivered APL be equipped with self-destruct devices and backup self-deactivation features.
(3) Requires that all nonremotely delivered APL not equipped with such devices ("Dumb Mines") be used within controlled, marked, and monitored minefields. (Falls short of Presidents APL policy statement of 16 May 1996 that prohibited U.S. military use of "Dumb" APL except in the Korean DMZ and in training. (4) Requires that all APL be detectable using available technology. (5) Requires that the party laying mines assume responsibility to ensure against their irresponsible or indiscriminate use. Provides for means to enforce compliance. In his letter of Transmittal, the President emphasizes his continued commitment to the elimination of all APL.
 4. US policy on anti-personnel land mines. US forces may no longer employ "dumb" (those that do not self-destruct or self-neutralize) anti-personnel land mines, according to a 16 May 1996 policy statement issued by the President. Exceptions to this policy:
 - a. Use of "dumb" mines in demilitarized zone between North and South Korea; and
 - b. Use of "dumb" mines for training purposes.
 5. Ottawa Process. On 19 August 1997, the U.S. joined the "Ottawa Process". Initiated by the Canadian Foreign Minister, the Process is attempting to draft a convention banning all APL. One hundred nations met in Oslo, Norway in September 1997 to draft the convention. They will reconvene in Ottawa in December 1997 to sign the convention. Although the U.S. joined the Process, it intends to propose exceptions for the use of APL mines in Korea and other uses of smart APL.
- F. Incendiaries. (FM 27-10, para. 36.) Examples: Napalm, flamethrowers, tracer rounds, and white phosphorous. None of these are illegal per se or illegal by treaty. The only US policy guidance is found in paragraph 36 of FM 27-10 which warns that they should "not be used in such a way as to cause unnecessary suffering." (See also para 6-7, AFP 110-31.)

1. Napalm and Flamethrowers. Designed for use against armored vehicles, bunkers, and built-up emplacements.
 2. White phosphorous. Designed for igniting flammable targets such as fuel, supplies, and ammunition and for use as a smoke agent. White phosphorous (Willy Pete) artillery and mortar ammunition is often used to mark targets for aerial bombardment.
 3. Protocol III of the 1980 Conventional Weapons Convention. Prohibits use of air-delivered incendiary weapons on military objectives located within concentrations of civilians. Has not been ratified by the U.S. The US is currently considering ratifying the protocol - with a reservation that incendiary weapons may be used within areas of civilian concentrations, if their use will result in fewer civilian casualties. For example: the use of incendiary weapons against a chemical munitions factory in a city could cause fewer incidental civilian casualties. Conventional explosives would probably disperse the chemicals, where incendiary munitions would burn up the chemicals.
- G. Lasers. US Policy (announced by SECDEF in Sep. 95) prohibits use of lasers specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision. Recognizes that collateral or incidental may occur as the result of legitimate military use of lasers (rangefinding, targeting). This policy mirrors that found in Protocol IV of the 1980 Conventional Weapons Treaty (this portion not yet ratified by US). The Senate is reviewing the protocol for its advice and consent for ratification.
- H. Chemical Weapons. (FM 27-10, para. 37.) Poison has been outlawed for thousands of years. Considered a treacherous means of warfare. Problem -- once unleashed it is hard to control. (HR, art. 23a.)
1. The 1925 Geneva Protocol. (FM 27-10, para 38, change 1.) Applies to all international armed conflicts.
 - a. Prohibits use of lethal, incapacitating, and biological agents. Protocol prohibits use of "asphyxiating, poisonous, or other gases and all analogous liquids, materials or devices. . . ."

- b. The U.S. considers the 1925 Geneva Protocol as applying to **both** lethal and incapacitating chemical agents.
 - c. Incapacitating Agents: Those chemical agents producing symptoms that persist for hours or even days after exposure to the agent has terminated. U.S. views riot control agents as having a "transient" effect -- and thus are NOT incapacitating agents. Therefore, their use in war is not prohibited by the treaty. (Other nations disagree with interpretation.) There are, however, policy limitations which are discussed below.
 - d. Under the Geneva Protocol of 1925 the U.S. reserved right to use lethal or incapacitating gases if the other side uses them first. (FM 27-10, para. 38b, change 1.) Presidential approval required for use. (E.O. 11850, 40 Fed. Reg. 16187 (1975); FM 27-10, para. 38c, change 1.) HOWEVER THE US RATIFIED THE CHEMICAL WEAPONS CONVENTION (CWC) IN 1997. THE CWC DOES NOT ALLOW THIS "SECOND" USE.
 - e. Riot Control Agents. U.S. has an understanding to the Treaty that these are not prohibited.
2. Riot Control Agents (RCA). U.S. RCA Policy is found in Executive Order 11850. Applies to use of Riot Control Agents and Herbicides; requires Presidential approval before first use in an armed conflict.
- a. Riot Control Agents: renounces first use in armed conflicts except in defensive military modes to save lives such as:
 - (1) controlling riots;
 - (2) dispersing civilians where the enemy uses them to mask or screen an attack;
 - (3) rescue missions for downed pilots, escaping PWs, etc.; and
 - (4) for police actions in our rear areas.

- b. Oleoresin Capsicum Pepper Spray (OC) a/k/a Cayenne Pepper Spray: U.S. classifies OC as a Riot Control Agent. (DAJA-IO, Information Paper of 15 August 1996, Use of Oleoresin Capsicum (OC) Pepper Spray and other Riot Control Agents (RCAs); DAJA-IO Memo of 20 September 1994, Subject: Request for Legal Review - Use of Oleoresin Capsicum Pepper Spray for Law Enforcement Purposes; CJCS Memo of 1 July 1994, Subject: Use of Riot Control Agents.)
- 3. 1993 Chemical Weapons Convention (CWC) (ref. 9). This treaty was ratified by U.S. and came into force in April 1997.
 - a. Provisions (twenty four articles).
 - (1) Article I. Parties agree to never develop, produce, stockpile, transfer, use, or engage in military preparations to use chemical weapons. Retaliatory use (second use) not allowed; significant departure from 1925 Geneva Protocol. Requires destruction of chemical stockpiles. Each party agrees not to use Riot Control Agents (RCAs) as a “method of warfare.”
 - (2) Article II. Definitions of chemical weapons, toxic chemical, RCA, and purposes not prohibited by the convention.
 - (3) Article III. Requires parties to declare stocks of chemical weapons and facilities they possess.
 - (4) Articles IV and V. Procedures for destruction and verification, including routine on-site inspections.
 - (5) Article VIII. Establishes the Organization for the Prohibition of Chemical Weapons (OPWC).
 - (6) Article IX. Establishes “challenge inspection”, a short notice inspection in response to another party’s allegation of non-compliance.

- b. RCA Controversy. Convention prohibits RCA use as “method of warfare.” “Method of warfare” is interpreted to include any actions that involve combatants - including traditional hostage rescue/SAR missions and human shield scenarios previously allowed by EO 11850.
- (1) The rationale for the prohibition - we do not want to give states the opportunity for subterfuge. Keep all chemical equipment off the battlefield, even if it is supposedly only for use with RCA. Secondly, we do not want an appearance problem - with combatants confusing RCA equipment as equipment intended for chemical warfare. Basically EO 11850 is still in effect and RCA can be used in certain defensive modes with presidential authority. However, any use in which “combatants” may be involved will most likely not be approved
 - (2) The Senates resolution of advice and consent for ratification to the CWC (S. Exec. Res. 75 - Senate Report, s3373 of 24 April 1997, section 2- conditions, (26) - riot control agents) required that the President must certify that the U.S. is not restricted by the CWC in its use of riot control agents, including the use against “combatants” in any of the following cases:
 - (a) when the U.S. is not a party to the conflict
 - (b) in consensual (Chapter VI, UN Charter) peacekeeping, and
 - (c) in Chapter VII (UN Charter) peacekeeping.
 - (3) The implementation section of the resolution requires that the President not modify E.O. 11850. (*see* S. Exec Res. 75, section 2 (26)(b), s3378)

- (4) The Presidents certification document of 25 April 1997 states that “the United States is not restricted by the convention in its use of riot control agents in various peacetime and peacekeeping operations. These are situations in which the U.S. is not engaged in the use of force of a scope, duration, and intensity that would trigger the laws of war with respect to U.S. forces.”
- (5) Thus, during peacekeeping missions (such as Bosnia, Somalia, Rwanda and Haiti) it appears U.S. policy will maintain that we are not party to the conflict for as long as possible. Therefore RCA would be available for all purposes under E.O. 11850. However, in armed conflicts (such as Desert Storm, Panama, and Grenada) it is unlikely that the NCA will approve the use of RCA in situations where “combatants” are involved due to the CWC’s prohibition on the use of RCA as a “method of warfare.” (Thus, use of RCA unlikely in the CSAR and the human shield situations used as examples of defensive modes under E.O. 11850 .)

- I. Herbicides. E.O. 11850 renounces first use in armed conflicts, except for domestic uses and to control vegetation around defensive areas. (e.g., Agent Orange in Vietnam.)
- J. Biological. The 1925 Geneva Protocol prohibits bacteriological methods of warfare. The 1972 Biological Weapons Convention (ref. 11) supplements the 1925 Geneva Protocol and prohibits the production, stockpiling, and use of biological and toxin weapons. U.S. renounced all use of biological and toxin weapons.
- K. Nuclear Weapons. (FM 27-10, para. 35.) Not prohibited by international law. On 8 July 1996, the International Court of Justice (ICJ) issued an advisory opinion that "There is in neither customary nor international law any comprehensive and universal prohibition of the threat or use of nuclear weapons." However, by a split vote, the ICJ also found that "The threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict." The Court stated that it could not definitively conclude whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self defense, in which the very survival of the state would be at stake. (35 I.L.M. 809 (1996).)

LIII. TACTICS

A. Psychological operations. Gulf War - US PSYOPS leaflet program - PSYOPS units distributed over 29 million leaflets to Iraqi forces. The themes of the leaflets were the "futility of resistance; inevitability of defeat; surrender; desertion and defection; abandonment of equipment; and blaming the war on Saddam Hussein." It was estimated that nearly 98% of all Iraqi prisoners acknowledged having seen a leaflet; 88% said they believed the message; and 70% said the leaflets affected their decision to surrender." Adolph, *PSYOP: The Gulf War Force Multiplier*, Army Magazine 16 (December 1992).

B. Ruses. (FM 27-10, para. 48). Injuring the enemy by legitimate deception (abiding by the law of war--actions are in good faith). Examples of Ruses.

1. Naval Tactics. A common naval tactic is to rig disguised vessels or dummy ships, e.g., to make warships appear as merchant vessels. Some examples follow:

World War I - Germany: Germany often fitted her armed raiders with dummy funnels and deck cargoes and false bulwarks. The German raider *Kormoran* passed itself off as a Dutch merchant when approached by the Australian cruiser *Sydney*. Once close enough to open fire she hoisted German colors and fired, sinking *Sydney* with all hands. See C. John Colombos, *The International Law of the Sea* 454-55 (1962).

World War II - Britain: British Q-ship program during WWII. The British took merchant vessels and outfitted them with concealed armaments and a cadre of Royal Navy crewmen disguised as merchant mariners. When spotted by a surfaced U-boat, the disguised merchant would allow the U-boat to fire on them, then once in range, the merchant would hoist the British battle ensign and engage the U-boat. The British sank 12 U-boats by this method. This tactic caused the Germans to shift from surfaced gun attacks to submerged torpedo attacks. LCDR Mary T. Hall, *False Colors and Dummy Ships: The Use of Ruse in Naval Warfare*, Nav. War. Coll. Rev., Summer 1989, at 60.

2. Land Warfare. Creation of fictitious units by planting false information, putting up dummy installations, false radio transmissions, using a small force to simulate a large unit. (FM 27-10, para. 51.) Some examples follow:

World War II - Allies: The classic example of this ruse was the Allied Operation Fortitude prior to the D-Day landings in 1944. The Allies, through

the use of false radio transmissions and false references in bona fide messages, created a fictitious First US Army Group, supposedly commanded by General Patton, located in Kent, England, across the English Channel from Calais. The desire was to mislead the Germans to believe the cross-Channel invasion would be there, instead of Normandy. The ruse was largely successful. John Keegan, *The Second World War* 373-79 (1989).

Gulf War - Coalition: Coalition forces, specifically XVIII Airborne Corps and VII Corps, used deception cells to create the impression that they were going to attack near the Kuwaiti bootheel, as opposed to the "left hook" strategy actually implemented. XVIII Airborne Corps set up "Forward Operating Base Weasel" near the bootheel, consisting of a phony network of camps manned by several dozen soldiers. Using portable radio equipment, cued by computers, phony radio messages were passed between fictitious headquarters. In addition, smoke generators and loudspeakers playing tape recorded tank and truck noises were used, as were inflatable Humvees and helicopters. Rick Atkinson, *Crusade*, 331-33 (1993).

3. Use of Enemy Property. Enemy property may be used to deceive under the following conditions:
 - a. Uniforms. Combatants may wear enemy uniforms but cannot fight in them. Note, however, that military personnel not wearing their uniform lose their PW status if captured and risk being treated as spies (FM 27-10, para. 54, 74; NWP 1-14M, para. 12.5.3; AFP 110-31, 8-6.)

World War II - Germany: The most celebrated incident involving the use of enemy uniforms was the Otto Skorzeny trial arising from activities during the Battle of Bulge. Otto Skorzeny was brigade commander of the 150th SS Panzer Brigade. Several of his men were captured in US uniforms, their mission being to secure three critical bridges in advance of the German attack. 18 of Skorzeny's men were executed as spies following the battle. Following the war, ten of Skorzeny's officers, as well as Skorzeny himself, were accused of the improper use of enemy uniforms, among other charges. All were acquitted. The evidence did not show that they actually fought in the uniforms, consistent with their instructions. The case generally stands for the proposition that it is only the fighting in the enemy uniform that violates the law of war. (DA Pam 27-161-2 at 54.)

For listing of examples of the use of enemy uniforms see W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. Rev. 1, 77-78 (1990).

For an argument against any use of the enemy's uniform see Valentine Jobst III, *Is the Wearing of the Enemy's Uniform a Violation of the Laws of War?*, 35 Am. J. Int'l L. 435 (1941).

- b. Colors. The US position regarding the use of enemy flags is consistent with its practice regarding uniforms, i.e., the US interprets the "improper use" of a national flag (HR, art. 23(f).) to permit the use of national colors and insignia of enemy as a ruse as long as they are not employed during actual combat (FM 27-10, para. 54; NWP 1-14M, para 12.5.). Note the Protocol I position on this issue in paragraph (d) below.
 - c. Equipment. Must remove all enemy insignia in order to fight with it. Captured supplies: may seize and use if state property. Private transportation, arms, and ammunition may be seized, but must be restored and compensation fixed when peace is made. (HR, art. 53).
 - d. Protocol I. GP I, Article 39(2) prohibits virtually all use of these enemy items. (*see* NPW 1-14M, para 12.5.3.) Article 39 prohibits the use in an armed conflict of enemy flags, emblems, uniforms, or insignia while engaging in attacks or "to shield, favour, protect or impede military operations." The U.S. does not consider this article reflective of customary law. This article, however, expressly does not apply to naval warfare, thus the customary rule that naval vessels may fly enemy colors, but must hoist true colors prior to an attack, lives on. (GP I, art 39(3); NWP 1-14M, para. 12.5.1.)
- C. Use of Property. (*See, Elyce Santere, From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield*, 124 Mil. L. Rev. 111 (1989).) Confiscation - permanent taking without compensation; Seizure - taking with payment or return after the armed conflict; Requisition - appropriation of private property by occupying force with compensation as soon as possible; Contribution - a form of taxation under occupation law.
- D. Treachery and Perfidy. Prohibited under the law of war. (FM 27-10, para. 50; HR. art. 23b.) Perfidy involves injuring the enemy by his adherence to the law of war (actions are in bad faith).

1. Condemnation. Condemnation of perfidy is an ancient precept of the LOW - derived from principle of chivalry. Perfidy degrades the protections and mutual restraints developed in the mutual interest of all Parties, combatants, and civilians. In practice, combatants find it difficult to respect protected persons and objects if experience causes them to believe or suspect that the adversaries are abusing their claim to protection under the LOW to gain a military advantage. Thus, the prohibition is directly related to the protection of war victims. Practice of perfidy also inhibits restoration of peace. (Michael Bothe, et. al., *New Rules for Victims of Armed Conflicts*, 202 (1982); FM 27-10, para. 50.)

2. Feigning and Misuse. Distinguish feigning from misuse. Feigning is treachery that results in killing, wounding, or capture of the enemy. Misuse is an act of treachery resulting in some other advantage to the enemy. Note that in order to be a violation of GP I, Article 37 the feigning of surrender or an intent to negotiate under a flag of truce must result in a killing, capture, or surrender of the enemy. Simple misuse of a flag of truce, not necessarily resulting in one of those consequences is, nonetheless, a violation of Article 38 of Protocol I, which the US also considers customary law. An example of such misuse would be the use of a flag of truce to gain time for retreats or reinforcements. Morris Greenspan, *The Modern Law of Land Warfare* 320-21 (1959). Article 38 is analogous to the Hague IV Regulation prohibiting the improper use of a flag of truce, art 23(f).

3. Protocol I. According to GP I, Article 37(1), the **killing, wounding, or capture via** "[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence [are perfidious, thus prohibited acts]." (US considers customary law.) Article 37(1) does not prohibit perfidy per se, only certain perfidious acts that result in killing, wounding, or capturing, although it comes very close. The ICRC could not gain support for an absolute ban on perfidy at diplomatic conference. (Bothe, *supra*, at 203.) Article 37 also refers only to confidence in international law (LOW), not moral obligations. The latter viewed as too abstract by certain delegations. (*Id.* at 204-05.) Note, however, that the US view includes breaches of moral, as well as legal obligation as being a violation, citing the broadcasting of an announcement to the enemy that an armistice had been agreed upon when it had not as being treacherous. (FM 27-10, para 50.)

4. Feigning incapacitation by wounds/sickness. (GPI, art. 37(1)(b).) Whiteman says HR, Article 23b also prohibits this, e.g. if shamming wounds and then attacking approaching soldier. Marjorie M. Whiteman, Dep't of State, 10 *Digest of International Law* 390 (1968); NWP 1-14M, para. 12.7.
5. Feigning surrender or the intent to negotiate under a flag of truce. (GP I, Art 37(1)(a).)
 - a. Falklands War - British: During the Battle for Goose Green, some Argentinean soldiers raised a white flag. A British lieutenant and 2 soldiers went forward to accept what they thought was a surrender. They were killed by enemy fire. The incident was disputed. Apparently, one group of Argentines was attempting to surrender, but not another group. The Argentinean conduct was clearly treachery if the British soldiers were killed by those raising the white flag, but it was not treacherous if they were killed by other Argentineans either unaware of the white flag, or not wishing to surrender. This incident emphasizes the rule that the white flag is an indication of a desire to negotiate only and that its hoister has the burden to come forward. See Major Robert D. Higginbotham, *Case Studies in the Law of Land Warfare II: The Campaign in the Falklands*, Mil. Rev., Oct. 1984, at 49.
 - b. Gulf War - Battle of Khafji incident was not a perfidious act. Media speculated that Iraqi tanks with turrets pointed aft, then turning forward when action began was perfidious act. DOD Report to Congress rejected that observation, stating that the reversed turret is not a recognized symbol of surrender *per se*. "Some tactical confusion may have occurred, since Coalition ground forces were operating under a defensive posture at that time, and were to engage Iraqi forces only on a clear indication of hostile intent, or some hostile act." Dep't of Defense, *Final Report to Congress: Conduct of the Persian Gulf War* 621 (1992).
 - c. Gulf War - On one occasion, however, Iraqi forces did apparently engage in perfidious behavior. In a situation analogous to the Falklands War scenario above, Iraqi soldiers waved a white flag and also laid down their arms. As Saudi forces advanced to accept the surrender, they took fire from Iraqis hidden in buildings on either side of street. Id.

- d. Gulf War - On another occasion an Iraqi officer approached Coalition force with hands up indicating his intent to surrender. Upon nearing the Coalition forces he drew a concealed pistol, fired, and was killed. Id.
6. Feigning civilian, noncombatant status. "Attacking enemy forces while posing as a civilian puts all civilians at hazard." (GP I, art 37(1)(c); NWP 1-14M, para. 12.7.)
7. Feigning protected status by using UN, neutral, or nations not party to the conflict's signs, emblems, or uniforms. (GP I, art 37(1)(d).)
 - a. As an example, on 26 May 1995, Bosnian Serb commandos dressed in uniforms, flak jackets, helmets, weapons of the French, drove up to French position on a Sarajevo bridge in an APC with UN emblems. French forces thought all was normal. The commandos, however, then proceeded to capture French Peacekeepers without firing a shot. Joel Brand, *French Units Attack Serbs in Sarajevo*, Wash. Post, May 28, 1995, at A1.
 - b. As in the case of the misuse of the flag of truce, misuse of a UN emblem which does not result in a killing, capture, or surrender, is nonetheless, a violation of Art 38, GPI. Note, however, that this prohibition only applies if the UN force is not an actual combatant force, a condition which has only arisen on one occasion: the Korean War. Michael Bothe, *et. al.*, *New Rules for Victims of Armed Conflicts* 206 (1982).
8. Misuse of Red Cross, Red crescent, cultural property symbol.
 - a. Designed to reinforce/reaffirm HR, Article 23f.
 - b. GWS requires that wounded & sick, hospitals, medical vehicles, and in some cases, medical aircraft be respected and protected. Protection lost if committing acts harmful to enemy. As an example, during the Grenada Invasion, US aircraft took fire from the Richmond Hills Hospital, and consequently engaged it. (DA Pam 27-161-2, p. 53, n. 61.)

- c. Cultural property symbols include 1954 Hague Cultural Property Convention, Roerich Pact, 1907 Hague Conventions symbol. (Bothe, *supra*, at 209.)
- 9. Misuse of internationally recognized distress signals, e.g., ICAO, IMCO distress signals.
- 10. Booby Traps. Certain uses of booby-traps prohibited by the 1980 Conventional Weapons Convention would otherwise be perfidious. Under this convention, it is prohibited to booby trap dead bodies; sick and wounded; burial sites and graves; medical facilities, supplies, or transportation; and historic monuments, works of art that constitute the cultural heritage of a people.
- E. Assassination. Hiring assassins, putting a price on the enemy's head, and offering rewards for an enemy "dead or alive" is prohibited. (FM 27-10, para 31; E.O. 12333.) Targeting military leadership, however, is not assassination. See W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, Army Law. Dec. 1989, at 4.
- F. Espionage. (FM 27-10, para. 75; GP I, art. 46.) Acting clandestinely (or on false pretenses) to obtain information for transmission back to their side. Gathering intelligence while in uniform is not espionage.
 - 1. Espionage is not a law of war violation.
 - 2. No protection, however, under Geneva Conventions for acts of espionage.
 - 3. Tried under the laws of the capturing nation. E.g., Art. 106, UCMJ.
 - 4. Reaching friendly lines immunizes spy for past espionage activities. Therefore, upon later capture as a lawful combatant, past spy cannot be tried for past espionage.
- G. Reprisals. (FM 27-10, para 497.) An otherwise illegal act done in response to a prior illegal act by the enemy. The purpose of a reprisal is to get the enemy to adhere to the law of war.

1. Reprisals are authorized if the following requirements are met:
 - a. it's timely;
 - b. it's responsive to enemy's act;
 - c. must first attempt a lesser form of redress; and
 - d. must be proportional.
2. Prisoners of war and persons "in your control" can not be objects of reprisals. Protocol I prohibits reprisals against numerous targets such as the entire civilian population, civilian property, cultural property, objects indispensable to the survival of the civilian population (food, livestock, drinking water), the natural environment, installations containing dangerous forces (dams, dikes, nuclear power plants) (GP I, arts. 51-56).
3. US policy is that a reprisal may be ordered only at the highest levels (NCA).

H. Rules of Engagement. Defined: Directives issued by competent superior authority that delineate the circumstances and limitations under which US forces will initiate and/or continue engagement with other forces.

1. ROE are drafted in part based upon the LOW. Drafted considering LOW, political policy, public opinion, and military operational constraints. ROE are usually more restrictive than what the LOW would allow.
2. Targeting rules are often incorporated within ROE for a given operation.
3. JCS Standing ROE (CJCS Instruction 3121.01 dtd 1 Oct 94): Guidance as to course of action in specific situations. "Inherent Right of Self-Defense" for both individual and the unit is the foundation of document.

LIV. CONCLUSION

- A. Principles
- B. Targets
- C. Weapons
- D. Tactics